No. 90-1859-CFH
Status: GRANTED

Title: J. C. Keeney, Superintendent, Oregon State Penitentiary, Petitioner
v.
Jose Tamayo-Reyes

Docketed:
June 3, 1991

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Linder,Virginia L.

Counsel for respondent: Wax,Steven T.

NOTE: Due 060291-SUN

Entry	Date	Note	Proceedings and Orders
1	Jun 3 1991	G	Petition for writ of certiorari filed.
2	Jul 1 1991		Brief of respondent Jose Tamayo-Reyes in opposition filed.
3	Jul 1 1991		* Motion and form 4 affidavit in route.
6	Jul 1 1991	G	Motion of petitioner for leave to proceed in forma pauperis filed.
4	Jul 2 1991		DISTRIBUTED. September 30, 1991
5	Jul 11 1991	X	Reply brief of petitioner J.C. Keeney filed.
7	Oct 7 1991		Motion of petitioner for leave to proceed in forma pauperis GRANTED.
8	Oct 7 1991		Petition GRANTED.
			**********
9	Nov 15 1991		Record filed.
		*	Proceedings and briefs United States Court of Appeals for the Ninth Circuit.
10	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 15, 1992. (3RD CASE)
11	Nov 21 1991		Brief amici curiae of California, et al. filed.
12	Nov 21 1991		Joint appendix filed.
13	Nov 21 1991		Brief of petitioner Keeney, Superintendent filed.
14	Nov 21 1991	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
15	Nov 27 1991		CIRCULATED.
16	Dec 9 1991		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
18	Dec 18 1991		Record filed.
		*	Certified proceedings United States District Court for the District of Oregon.
17	Dec 23 1991	X	Brief of respondent Jose Tamayo-Reyes filed.
19	Jan 7 1992	X	Reply brief of petitioner J.C. Keeney filed.
20	Jan 15 1992		ARGUED.

(1)

90-1859

No. 90-_____

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is "deliberate by-pass" or "cause and prejudice" the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state proceedings?

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PETITION FOR WRIT OF CERTIORARI

Petitioner J.C. Keeney, Superintendent of the Oregon State Penitentiary (hereafter the "State"), respectfully prays that the Court issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit and reverse its judgment.

OPINIONS BELOW

The court of appeals' opinion is reported as *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991). A copy of the opinion is attached as Appendix A. The district court's opinion and the magistrate's findings and recommendation are not reported. They are attached as Appendices B and C respectively.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision. 28 U.S.C. § 1254(1). Although the court of appeals remanded the case for further proceedings, that does not affect the Court's jurisdiction under section 1254(1). *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

STATUTES INVOLVED

Section 2254(d) of Title 28 provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof

were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved by the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when the proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent Tamayo-Reyes was engaged in a knife fight with his fiancée in a Portland, Oregon tavern. When a stranger attempted to intervene, Tamayo-Reyes turned, stabbed the stranger, and killed him. The state charged Tamayo-Reyes with murder. A lawyer was appointed to represent him. Because Tamayo-Reyes speaks Spanish but little or no English, an interpreter was appointed to assist the defense. Not only was Spanish the interpreter's native language, but he was also an attorney.

Tamayo-Reyes decided to plead no contest to the lesser charge of first-degree manslaughter. He signed a plea petition, which set out the crime to which he was pleading, the rights he was giving up, the maximum sentence, the sentence the district attorney recommended, and the factual basis for his plea. Paragraph 4 of the signed plea petition states:

> I told my lawyer all the facts and circumstances known to me about the charges against me. I believe

> that my lawyer is fully informed on all such matters. My lawyer has counseled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses I might have in this case.

Before the state trial court accepted the no-contest plea, it questioned Tamayo-Reyes' attorney about the plea petition. His attorney told the court:

> I had Mr. Sanchez [the interpreter] translate the English [plea petition] form, from English to Spanish, directly to the defendant in my presence. Mr. Sanchez went over the form with him in Spanish. I asked [Tamayo-Reyes] if he understood it. He indicated he did understand it, and did wish to proceed as we contemplate proceeding this morning.

(Dec. 14, 1984 Tr. 2). The state trial court then re-advised Tamayo-Reyes of his rights, found that he understood them, and concluded that Tamayo-Reyes knowingly and voluntarily waived them as part of a no-contest plea.[1]

After he pled no-contest and was convicted on the manslaughter charge, Tamayo-Reyes filed a state post-conviction petition to attack his conviction collaterally. Tamayo-Reyes' state post-conviction petition raised two claims, both of which rested on the allegation that the interpreter's Spanish translation had been inadequate. He

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[1] The state trial court found:

> Mr. Reyes understands all of the rights that I've gone over with him, and that are explained in the plea petition, and he's making a knowing and voluntary waiver of those rights and chose to plead no contest and accept the consequences of a conviction for manslaughter in the first degree.

(Dec. 14, 1984, Tr. 2).

contended first that the interpreter did not tell him that pleading no contest waived his right to a jury trial. Second, he contended that the interpreter did not explain the mental element of first-degree manslaughter.

Counsel was appointed, and the state post-conviction court held a trial to determine the merits of Tamayo-Reyes' claims. The full panoply of trial procedures—discovery, compulsory process, cross-examination—was available to Tamayo-Reyes, and his counsel took advantage of them. After hearing the evidence, the state post-conviction court held that Tamayo-Reyes' no-contest plea "was knowingly and voluntarily entered." It found that he "was properly served by an interpreter in the proceedings leading to his conviction." It also found that the "interpreter correctly, fully and accurately translated the communications between Petitioner and his [trial] attorney." Based on these factual findings, the state post-conviction court declined to vacate Tamayo-Reyes' conviction. The Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review.

On federal habeas, the district court denied Tamayo-Reyes' habeas petition. The district court concluded that the state post-conviction court's factual findings disposed of Tamayo-Reyes' federal claims. It found no reason why those findings should not be presumed correct. It rejected Tamayo-Reyes' claim that a new evidentiary hearing was required because his counsel failed to develop material facts at the state post-conviction hearing. It found that petitioner had not established that the failure was not due to his own inexcusable neglect.

The court of appeals reversed and remanded. *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1502. It reasoned that material facts were not adequately developed at the state post-conviction hearing—specifically, the way in which the interpreter translated the mental element of manslaughter. *Id.*, at 1500. The court of appeals held that federal courts need not defer to state court fact findings unless the failure to develop the material facts in state court was due to the habeas petitioner's deliberate by-pass. *Id.*, at 1501-1502. Under the Ninth Circuit's reasoning, the deliberate by-pass standard announced in *Fay v. Noia*, 372 U.S. 391 (1963), provides the applicable test when a habeas petitioner seeks to have the federal courts reconsider factual disputes the state court already has resolved. *Ibid.*

REASONS FOR ALLOWING THE WRIT

Before turning to the argument, it is perhaps helpful to frame the question presented. *Townsend v. Sain*, 372 U.S. 293, 312-313 (1963), recognized that an evidentiary hearing is not required in federal habeas if "the state-court trier of fact has after a full hearing reliably found the relevant facts." The Court identified six situations in which the state court's fact findings will not be considered reliable. *Id.*, at 313. One is when "the material facts were not adequately developed at the state court hearing." *Ibid.*

Basing the right to a federal evidentiary hearing on a habeas petitioner's failure to take advantage of state proceedings provides little incentive to take the state proceedings seriously. *Townsend* was not unaware of this risk but reasoned that the deliberate by-pass standard in *Fay v. Noia*, *supra*, decided that same day, struck the proper balance

between the state and federal interests. *Townsend v. Sain*, 372 U.S., at 317. *Townsend* accordingly held that a habeas petitioner's failure to develop facts in the state court proceedings would entitle him to a federal evidentiary hearing unless the failure was due to the petitioner's deliberate by-pass. *Ibid.*

Since *Townsend* and *Fay*, the Court has recognized that *Fay*'s deliberate by-pass standard is inconsistent with the doctrines of comity and federalism. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The deliberate by-pass standard provides criminal defendants with too little incentive to litigate their federal claims fully in state court, *id.*, at 90-91, and it gives too little deference to the notions of comity Congress intended to preserve when it adopted 28 U.S.C. § 2254(d), *see Sumner v. Mata*, 449 U.S. 539 (1981). The question thus presented by the Ninth Circuit's opinion is whether *Fay*'s deliberate by-pass standard or *Wainwright*'s cause and prejudice standard provides the proper test to determine when a habeas petitioner will be excused for failing to develop material facts in state proceedings. Having framed the question, this petition now turns to why the Ninth Circuit's answer warrants a grant of certiorari.

The Ninth Circuit's answer was to follow *Fay*. The breadth of the Ninth Circuit's holding gives one pause. Few trials are perfect, and it is difficult to imagine a case in which a federal habeas petitioner cannot think how his case could have been tried better in state court. If deliberate by-pass is the only bar to re-litigating factual issues in federal habeas, there will be few federal habeas actions that do not result in a new evidentiary hearing. New federal evidentiary hearings will be required in all cases that state court counsel inadver-

tently or purposefully failed to develop a material fact. The only time a new evidentiary hearing will not be required is when the petitioner himself "understandingly and knowingly" forewent putting the fact before the state court. 926 F.2d, at 1500.

The problem with the court of appeals' holding is not merely that it places a substantial burden on the federal courts and on States to re-litigate factual questions in federal habeas that the petitioner already had a full and fair opportunity to litigate in state court. Equally significant is the court of appeals' failure to give due regard to the doctrines of comity and federalism that have informed this Court's habeas decisions. The general rule, stated in 28 U.S.C. § 2254(d) and grounded in congressional concerns for comity, is that federal courts should defer to the state courts' resolution of the facts. *Sumner v. Mata*, 449 U.S., at 550; *Sumner v. Mata*, 455 U.S. 591, 597-598 (1982) (per curiam). If, however, a habeas petitioner has a right, absent deliberate by-pass, to a federal evidentiary hearing whenever a material fact was not developed adequately in state court, little will be left of either the general rule or of comity.[2] Similarly, one of the reasons for requiring complete exhaustion of state remedies will be defeated if a habeas petitioner is entitled to a new

[2] Section 2254(d) contains an exception to the deference due state court fact finding similar to the one at issue here. Subsection d(3) provides that the presumption of correctness does not apply if the petitioner demonstrates "that the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3). Section 2254(d) was enacted after *Townsend*. Nothing in its legislative history suggests that Congress intended to codify *Fay*'s deliberate by-pass standard. Rather, Congress' emphasis on comity in adopting the statute cuts against such an inference. *See Sumner v. Mata*, 449 U.S., at 550.

federal evidentiary hearing on showing only that he inadvertently failed to offer all material evidence at the state hearing. *See Rose v. Lundy*, 455 U.S. 509, 519 (1982) (one benefit of a complete exhaustion rule is that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review").

Finally, the Ninth Circuit's holding is at odds with the Court's holding in *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *Finley* held that a convicted defendant has no constitutional right to counsel on state collateral review and no claim of ineffective assistance of counsel. Under *Finley*, a habeas petitioner could not ask a federal district court to ignore the state court's fact findings on collateral review because his counsel negligently failed to develop a complete record. Yet, that is precisely what the Ninth Circuit's decision allows a habeas petitioner to do.

Not only is the Ninth Circuit's holding far reaching and significant, but it is incorrect. *Wainwright v. Sykes*, *supra*, expressly rejects *Fay*'s deliberate by-pass standard to the extent it applies beyond *Fay*'s facts. 433 U.S., at 88 and n. 12. After *Wainwright*, cause and prejudice, not deliberate by-pass is the proper test. It follows that *Wainwright* modified *Townsend* to the extent *Townsend* incorporated *Fay*'s deliberate by-pass standard.[3] *Wainwright*'s reasoning leads to the

[3] To be sure, *Wainwright* does not address this issue expressly. It held that the petitioner's failure to raise an issue in state court will bar him or her from litigating that issue in federal habeas absent cause and prejudice. But its limitation of *Fay*'s deliberate by-pass standard to the facts of that case necessarily modifies *Townsend* to the extent it incorporated *Fay*'s standard.

same result. *Wainwright* explains that the state proceedings should be the focus of the criminal defendant's efforts. If he or she has evidence that bears on a federal constitutional issue, then both the issue and the evidence should be presented to the state court. As *Wainwright* observed, "the state trial on the merits [should be] the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." 433 U.S., at 90.

The Ninth Circuit never discusses *Wainwright*.[4] It observes in a footnote that "[t]he validity of the *Fay* standard has been questioned," an observation that is somewhat understated, but concludes that *Fay* has not been questioned "in this context, where the issue is whether *Townsend* requires a federal evidentiary hearing." *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1501 n.19. Although the Ninth Circuit does not cite any support for this latter proposition, it may be thinking of a Fifth Circuit case in which the court found that *Fay* not *Wainwright* governed whether a federal evidentiary hearing was required. The court reasoned:

> [T]he policies relied upon in [*Wainwright v. Sykes*, *supra*], federalism, comity and concerns for the orderly administration of criminal justice, do not apply when the prisoner has challenged the violations throughout the state process and the state has held proceedings directed at the constitutional claim reasserted in a federal habeas court.

[4]The State argued in both the district court and the court of appeals that *Wainwright* provided the applicable test and that even if it did not, petitioner had failed to satisfy the burden stated in *Fay*. (*See* Appellee's Brief 28-31 and n.13).

Guice v. Fortenberry, 661 F.2d 496, 507 n. 25 (5th Cir. 1981) (en banc). The Fifth Circuit thus concluded that comity and federalism need not inform a federal court's decision whether to defer to state court fact findings.[5]

The Fifth Circuit's reasoning is inconsistent with *Sumner v. Mata*, *supra*. *Sumner* establishes that issues of comity and federalism apply with the same force to state court fact findings as they do to the failure to raise issues completely. A contrary rule would make little sense. It would serve no purpose to hold a federal habeas petitioner responsible for raising an issue in state court (or show cause and prejudice for failing to do so) but not hold him equally responsible for putting all the material facts relevant to that issue before the state court.

The Ninth Circuit's rule, if it were allowed to stand, would subvert the reasoning in *Wainwright*, *Rose v. Lundy*, *supra*, and *Pennsylvania v. Finley*, *supra*. *Wainwright*, not *Fay*, provides the proper standard: The failure to develop material facts in states court will not entitle a habeas petitioner to a federal evidentiary hearing unless the petitioner can

[5] The Eleventh Circuit followed *Guice* in *Thomas v. Zant*, 697 F.2d 977, 982-83 (11th Cir. 1983). Although the Eleventh Circuit was not technically bound by the Fifth Circuit's holding in *Guice*, *see Bonner v. City of Pritchard*, 661 F.2d 1206, 1207-08 (11th Cir. 1981) (en banc) (establishing general rule that Eleventh Circuit only bound by those Fifth Circuit decisions handed down before September 30, 1981), the Eleventh Circuit judges formed part of the en banc Fifth Circuit court that decided *Guice*. It is not surprising that the Eleventh Circuit followed what was in effect its own decision. Since *Thomas*, other circuits have followed *Townsend*'s use of *Fay* without asking whether *Townsend* is still good law to the extent it incorporates the *Fay* standard. *Compare Smith v. Freeman*, 892 F.2d 331, 338-39 (3d Cir. 1989) (following *Fay* standard), *with Patterson v. Cuyler*, 729 F.2d 925, 928 n.2 (3d Cir. 1984) (adopting stricter standard); *see Rogers v. Israel*, 716 F.2d 1288, 1295 n.7 (7th Cir. 1984).

show cause and prejudice. The court of appeals should have either affirmed or remanded to the district court to test petitioner's claim under *Wainwright*'s standard.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Because the Ninth Circuit's decision is squarely inconsistent with *Wainwright*, the State respectfully suggests that summary reversal is appropriate.

Respectfully submitted,
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APPENDIX A

Jose TAMAYO-REYES,
Petitioner-Appellant,

v.

J.C. KEENEY, Respondent-Appellee.
No. 90-35315.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 10, 1991.
Decided March 4, 1991

Steven Jacobson, Asst. Federal Public Defender, Portland, Ore., for petitioner-appellant.

Rives Kistler, Asst. Atty. General, Salem, Ore., for respondent-appellee.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING, CANBY, and TROTT, Circuit Judges.

TROTT, Circuit Judge:

Jose Tamayo-Reyes appeals the denial of his habeas corpus petition, claiming the district court erred in refusing to grant an evidentiary hearing on whether his nolo contendere plea to manslaughter was unconstitutional. We reverse in part and remand because the district court improperly deferred to certain state court factual findings based on 28 U.S.C. § 2254(d) (1988), instead of holding an evidentiary hearing on the merits of Reyes's claim as required by

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

FACTS AND PROCEEDINGS BELOW

Reyes is a Cuban immigrant with little education and almost no knowledge of English. In 1984, he allegedly stabbed and killed a man in a bar fight. He was arrested, charged with murder, and provided with a defense attorney and interpreter.

Reyes's attorney, Mr. Tommy Hawk, decided Reyes should plead nolo contendere to Manslaughter in the First Degree. Or. Rev. Stat. § 163.118(1)(a) (1989). Reyes signed a plea form that explained in English the rights he was waiving by entering the plea. The state court then held a hearing to approve the plea, at which Reyes was represented by Hawk and his interpreter, Mr. Ben Sanchez. The judge asked Hawk and Sanchez if they had explained to Reyes the rights enumerated in the plea form and the consequences of pleading nolo contendere, and they answered in the affirmative. The judge then explained to Reyes in English the rights he would waive by his plea, asking Sanchez to translate for him. Reyes indicated he understood his rights and still wished to plead nolo contendere to manslaughter. The judge accepted his plea.

Two years later, Reyes collaterally attacked the plea in a post-conviction proceeding in the Oregon Circuit Court for the County of Marion. He alleged his plea had not been knowing and intelligent because Sanchez failed in several critical instances to translate accurately and completely for him. As a result, he claimed, he did not understand the purposes of the plea form or the plea hearing. He did not

know he was pleading no contest to manslaughter; instead he thought he was agreeing to be *tried* on the manslaughter count. He also contended his plea was invalid because Sanchez had not interpreted for him the mens rea element of manslaughter.[1]

Following the proceeding, the state court dismissed Reyes's petition. The state court of appeals affirmed without an opinion. *Reyes v. Keeney*, 88 Or. App. 187, 744 P.2d 1011 (1987). The state supreme court denied review. *Reyes v. Keeney*, 304 Or. 680, 748 P.2d 142 (1987). Reyes then petitioned the district court for a writ of habeas corpus, claiming he was entitled to an evidentiary hearing on whether his nolo contendere plea was unconstitutional.

The district court held that two findings by the state post-conviction court were dispositive of Reyes's claims, that these findings were presumed correct under 28 U.S.C. § 2254(d) (1988), and that therefore no evidentiary hearing was required, Reyes timely appeals.

We have jurisdiction under 28 U.S.C. §§ 1291 and 2253 (1988). We review de novo a district court's denial of a petition for a writ of habeas corpus. *Madera v. Risley*, 885 F.2d 646, 648 (9th Cir. 1989).

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[1]As we explain, we believe this last claim should be resolved by a federal evidentiary hearing.

ANALYSIS

I

The Substantive Legal Issues[2]

Our initial inquiry is whether Reyes's allegations, if proved, would establish the right to habeas corpus relief. *See Townsend*, 372 U.S. at 307, 83 S.Ct. at 754; *see also Nevius v. Sumner*, 852 F.2d 463, 466 (9th Cir. 1988), *cert. denied*, 490 U.S. 1059, 109 S.Ct. 1972, 104 L.Ed.2d 441 (1989). We are persuaded that Reyes makes the necessary allegations.

North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970), holds that the validity of a guilty or nolo contendere plea depends on whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Accord Mabry v. Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984); *Marshall v. Lonberger*, 459 U.S. 422, 436-37, 103 S.Ct. 843, 852, 74 L.Ed.2d 646 (1983).[3] Reyes

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[2]Reyes advanced two ineffective assistance of counsel claims in the state post-conviction court. When Reyes raised the claims again to the district court, the magistrate noted he arguably had failed to assert them in the state court of appeals. The magistrate overlooked the exhaustion defect, however, because he believed his denial of Reyes's claim that the plea was unconstitutional necessarily disposed of the ineffective assistance of counsel claims. On appeal, Reyes makes a single oblique reference to ineffective assistance of counsel, prompting the State to argue he has abandoned these claims. Reyes does not respond to this contention in his reply brief so we treat the ineffective assistance of counsel issues as abandoned.

[3]A nolo contendere plea is equivalent to a guilty plea in this context. *See Alford*, 400 U.S. at 37, 91 S.Ct. at 167; *see also Wallace v. Turner*, 695 F.2d 545, 548 (11th Cir. 1983).

advances two reasons why his plea of nolo contendere to manslaughter was not the product of an intelligent choice. The first is that Sanchez did not translate adequately the mens rea element of manslaughter. The second is that Sanchez did not translate adequately the plea form and the plea proceeding. We address these allegations in turn.

A. Translation of the Mens Rea Element of Manslaughter

In Oregon, Manslaughter in the First Degree is defined, in relevant part, as a "criminal homicide . . . committed recklessly under circumstances manifesting extreme indifference to the value of human life. . . ." Or. Rev. Stat. § 163.118(1)(a) (1989). Reyes alleges Sanchez failed to translate the mens rea element of this crime. At most, he claims, Sanchez told him only that manslaughter was "less than murder."

In *Henderson v. Morgan*, 426 U.S. 637, 646-47, 96 S.Ct. 2253, 2258, 49 L.Ed.2d 108 (1976), the Supreme Court invalidated a defendant's guilty plea to second-degree murder because he entered the plea without being informed that intent to cause death was an element of the offense. If Reyes indeed was told only that Manslaughter in the First Degree was "less than murder," the mens rea element of the offense was not adequately described to him, and he states a basis for overturning his plea. *See United States v. Bigman*, 906 F.2d 392, 394-95 (9th Cir. 1990); *Hayes v. Kincheloe*, 784 F.2d 1434, 1438-40 (9th Cir. 1986), *cert. denied*, 484 U.S. 871, 108 S.Ct. 198, 98 L.Ed.2d 150 (1987); *Williams v. Raines*, 783 F.2d 774, 775-76 (9th Cir. 1986); *Sober v. Crist*, 644 F.2d 807, 809-10 (9th Cir. 1981) (per curiam).

Henderson does not require that *every* element of the crime must be explained to the defendant; it establishes only that the defendant must be informed of the mens rea element. *Henderson*, 426 U.S. at 647 n. 18, 96 S.Ct. at 2258 n. 18; *see also Sober*, 644 F.2d at 809. Under Oregon's definition of Manslaughter in the First Degree, the terms "recklessly" and "extreme indifference" describe the mens rea element of the offense. Or. Rev. Stat. § 163.118(1)(a) (1989). The Oregon Supreme Court has held these terms are components of the same basic mental state, but that the "extreme indifference" language indicates more must be proved than mere recklessness.[4] Needless to say, the shades of legal meaning

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[4]Oregon defines "recklessly" as meaning:

> [T]hat a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Or. Rev. Stat. § 161.085(9) (1989).

The term "extreme indifference" is not defined in the statute, but has been interpreted by the Oregon Supreme Court:

> The Oregon Criminal Code defines four culpable mental states: intentional, knowing, reckless and criminally negligent. ORS 161.085(7)-(10). These statutes define neither extreme indifference to the value of human life nor the circumstances which may manifest such indifference. In the absence of a definition we determine the extreme indifference language does not create an additional culpable mental state. The language does however, require more than recklessness. We conclude that the jury must find not only recklessness but also conduct which in addition to recklessness, manifests extreme indifference to the value of

(continued...)

here are difficult even for English-speaking lawyers to differentiate. We do not believe, therefore, that *Henderson* demands a rigid, technically precise translation of the terms mentioned. However, if the general import of these terms was not adequately conveyed to Reyes, his nolo contendere plea was not knowing or voluntary.

We repeat our recent admonition that "'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.'" *Bigman*, 906 F.2d at 395 (quoting *Henderson*, 426 U.S. at 647, 96 S.Ct. at 2259); *cf. United States v. Goodheim*, 686 F.2d 776, 777-78 (9th Cir. 1982). Without expressing a view of when this presumption should attach as a general matter, we believe it is of limited relevance to this case. Even if we were to presume Hawk described to Reyes in English the mens rea element of manslaughter, there remains the critical issue of whether Sanchez accurately translated that communication. Without an adequate translation, Hawk's advice in English, no matter how lucid and complete, would not satisfy *Henderson*.

One might argue that whatever presumption exists concerning the completeness of attorneys' consultations with their clients should apply by extension to interpreters'

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[4](...continued)

> human life on the part of this defendant, as may be inferred from his conduct at the time of the events.

State v. Boone, 294 Or. 630, 651 F.2d 917, 919 (1963) (footnotes omitted).

translations of those communications. We are unprepared however, at least in the circumstances of this case, to confer upon the State the benefit of such a double presumption.

In sum, Reyes has alleged facts which, if proved, would establish a basis for habeas corpus relief.

B. Translation of the Plea Form and Plea Proceeding

Reyes's second claim is that Sanchez failed to translate accurately and completely (1) critical portions of the plea proceeding and (2) the plea form he signed in advance of the proceeding. As a result, Reyes asserts he had no idea what was happening at the hearing as the judge explained in English the nature of the impending plea and the rights he would waive by entering the plea. He also had no idea what he had agreed to by signing the plea form. In short, he did not understand that he was pleading nolo contendere to manslaughter and giving up his right to a jury trial. Reyes thus alleges a second set of facts which, if proved, would establish a basis for habeas corpus relief.

C. Determination Below

The state post-conviction court issued the following findings:

1. Petitioner's plea of guilty[5] was knowingly and voluntarily entered.
2. Petitioner was properly served by an interpreter in the proceedings leading to his conviction.

[5]The court here incorrectly labeled Reyes's nolo contendere plea a "plea of guilty."

3. The interpreter correctly, fully and accurately translated the communications between Petitioner and his attorney.
4. Petitioner has not sustained his burden of proof in regard to any of the allegations in his petition.
5. Representation by counsel was reasonable and effective under the circumstances.

The magistrate assumed Reyes's legal claims turned entirely on the credibility of his allegation that Sanchez "did not adequately translate the proceedings or convey the necessary information to [him]." In other words, he assumed the plea form, the plea proceeding, and Reyes's consultations with Hawk would have apprised an English-speaking defendant of his rights and alternatives, and would have enabled him to enter an intelligent plea.[6] The problem, if any, was with Sanchez's translations at each of the critical steps. The magistrate further found that the state post-conviction court's second and third findings, if accurate, were fatal to Reyes's allegation that the translations were insufficient. Finally, he decided that the two findings should be accorded the presumption of correctness under section 2254(d) that Reyes had failed to establish an exception to that presumption, and that

[6]We note that this assumption is itself questionable. There is little evidence in the record bearing on whether Reyes was afforded even an English language description of the mens rea element of manslaughter. We conclude later in this opinion that Reyes is entitled to a federal evidentiary hearing on whether Sanchez translated the mens rea element for him. At this hearing it shall be open to Reyes to challenge the premise that he was informed in English of this element, whether by his attorney, by the judge in the plea proceeding, or by some other medium such as a charging document.

no evidentiary hearing was required to further explore the basis of his claims.[7] The district court adopted the magistrate's opinion in all respects.

II

Applicability of Section 2254(d)'s Presumption of Correctness

The state post-conviction court found (1) "[Reyes] was properly served by an interpreter in the proceedings leading to his conviction." and (2) "[t]he interpreter correctly, fully and accurately translated the communications between [Reyes] and his attorney." Reyes argues as a threshold matter that these are not findings of fact and that therefore section 2254(d)'s presumption of correctness is inapplicable. *See* 28 U.S.C. § 2254(d) (1988); *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981) (*Sumner I*). His argument is meritless, as the district court found.

It is true that a state court's ultimate conclusion that a guilty plea was voluntarily and knowingly entered is a legal one, and is not presumed correct under section 2254(d). *Marshall v. Lonberger*, 459 U.S. 422, 431-32, 103 S.Ct. 843, 849, 74 L.Ed.2d 646 (1983). But the state court's finding in this case that Sanchez did an accurate and complete job of translating is purely one of "historical" fact. Reyes bristles at this suggestion, apparently because he believes a

[7]Section 2254(d) provides in relevant part that state court determinations "on the merits of a factual issue . . . shall be presumed to be correct" unless the habeas petitioner demonstrates one or more of eight enumerated exceptions apply. 28 U.S.C. § 2254(d) (1988).

finding that is largely dispositive of a legal claim necessarily is one of law. The Supreme Court has observed, however, that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller v. Fenton*, 474 U.S. 104, 113, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985). We therefore agree with the district court that the presumption of correctness applies here. As we explain, however, Reyes states an exception to the presumption on the first of his legal claims.

III

Whether an Exception to Section 2254(d)'s Presumption Applies and Whether a Federal Evidentiary Hearing is Required

A. The Relationship Between Townsend and Section 2254(d)

Courts traditionally have relied on *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), in determining whether a federal evidentiary hearing is required in a habeas corpus case.[8] *Townsend* decided before Congress enacted section 2254(d), requires a federal evidentiary hearing in a habeas corpus case under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as

[8]Several of our recent decisions have applied the *Townsend* standard to determine if the district court should have held an evidentiary hearing, but they provide little guidance in this case. *See, e.g., Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990); *Norris v. Risley*, 378 F.2d 1178, 1180 (9th Cir. 1989); *Bashor v. Risley*, 730 F.2d 1228, 1233 (9th Cir.), *cert. denied*, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984).

> a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313, 83 S.Ct. at 757. A glance at section 2254(d) reveals Congress incorporated these six circumstances into its list of eight exceptions to the presumption of correctness. 28 U.S.C. § 2254(d) 1988).[9] Indeed, the

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[9]Under section 2254(d), the presumption will not apply if the petitioner demonstrates any of the following circumstances:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing.
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding.
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, (continued...)

Supreme Court has observed that in enacting section 2254(d) Congress "codified" the criteria set forth in *Townsend*. *See Miller v. Fenton*, 474 U.S. 104, 111, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985); *Patton v. Yount*, 467 U.S. 1025, 1031 n. 7, 104 S.Ct. 2885, 2889 n. 7, 81 L.Ed.2d 847 (1984); *Brewer v. Williams*, 430 U.S. 387, 395, 97 S.Ct. 1232, 1237-38, 51 L.Ed.2d 424 (1977); *cf. Cuyler v. Sullivan*, 446 U.S. 335, 341, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980) (stating Townsend was the "precursor" to section 2254(d).[10]

Based on a comment in Justice Marshall's dissent in *LaVallee v. Delle Rose*, 410 U.S. 690, 701 n. 2, 93 S.Ct. 1203, 1209 n. 2, 35 L.Ed.2d 637 (1973) (per curiam), several courts have reasoned that *Townsend* and its progeny control whether an evidentiary hearing is required, while section 2254(d) merely governs the burden of proof at such a hearing.[11] *See Thomas v. Zant*, 697 F.2d 977, 984-85 (11th

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[9](...continued)
> pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such a factual determination is not fairly supported by the record.

28 U.S.C. § 2254(d) (1988)

[10]For a thorough study of the relationship between section 2254(d) and *Townsend*, *see Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983).

[11]Justice Marshall's dissent states: "Section 2254(d) says nothing concerning when a district judge may hold an evidentiary hearing. . . . So far as I understand, the question whether such a hearing is appropriate on federal habeas corpus continues to be controlled exclusively by our (continued...)

Cir. 1983); *Fowler v. Jago*, 683 F.2d 983, 988 (6th Cir. 1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 363 (1983); *see also Richmond v. Ricketts*, 774 F.2d 957, 961 (9th Cir. 1985). While this may be true as a matter of form, it is still the case that the same basic criteria generally are employed in both the *Townsend* and section 2254(d) inquiries.[12] In most cases, through not in all, the inquiries will merge.[13]

B. Translation of the Mens Rea Element of Manslaughter

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[11](...continued)
decision in *Townsend v. Sain*, even after the enactment of § 2254(d)." *LaVallee*, 410 U.S. at 701, n. 2, 93 S.Ct. at 1209 n. 2. One commentator examined this statement and concluded that "unlike Townsend, [section 2254(d)] does not purport to define when a federal evidentiary hearing is mandatory, it appears merely to state a set of rather confused burden of proof rules to guide the district courts which are to hold such hearings." P. Bator, D. Meltzer, P. Mishkin, and D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 1564 (3d ed. 1989).

[12]In one case, the Supreme Court treated the criteria in section 2254(d) and *Townsend* as if they were interchangeable:

> The habeas corpus statute, following this Court's decision in *Townsend* provides that, in general, 'a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . , *shall be presumed to be correct,' and an evidentiary hearing not required.*

Ford v. Wainwright, 477 U.S. 399, 410, 105 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (emphasis added). *See also*, Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989*, 78 Geo. L.J. 699, 1420 n. 3383 (1990) (noting that *Ford* appears to assume section 2254(d) and *Townsend* are identical).

[13]As we explain later in this opinion, this case presents an example of how the tests in *Townsend* and section 2254(d) are not always coextensive.

Reyes argues three exceptions to section 2254(d) apply to this case, and that we should therefore not presume correct the state court's implicit finding that Sanchez translated for Reyes the mens rea element of Manslaughter in the First Degree. He also claims under the parallel criteria in *Townsend* that an evidentiary hearing is required to explore the validity of his plea.

(1) *28 U.S.C. § 2254(d)(6) and Townsend's Sixth Circumstance*

Section 2254(d)'s presumption will not apply if the petitioner "did not receive a full, fair, and adequate hearing in the State court proceeding." 28 U.S.C. § 2254(d)(6) (1988). Likewise, under *Townsend*, 374 U.S. at 313, 83 S.Ct. at 757, a petitioner is entitled to a federal evidentiary hearing if "for any reason it appears that the state trier of fact did not afford [him] a full and fair fact hearing." We consider these tests to be coextensive. *Cf. Harris v. Pulley*, 692 F.2d 1189, 1197 (9th Cir. 1982), *rev'd on other grounds*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (implying the tests are the same); *Fritz v. Spalding*, 682 F.2d 782, 785 (9th Cir. 1982) (same); *Finklen v. Estelle*, 506 F.2d 438, 440 (5th Cir. 1975) (same).

In the state post-conviction court, Reyes was represented by counsel and was provided with a full-blown hearing to contest his nolo contendere plea. His attorney, Mr. Ronald Hellewell, was permitted to introduce evidence and examine and cross-examine witnesses. There is no indication the court restricted Hellewell's ability to present the case, and Reyes points to no other defects in the proceeding which suggest it

was not full and fair. Section 2254(d)(6) and *Townsend*'s sixth circumstance therefore do not apply.[14]

(2) *Section 2254(d)(3) and Townsend's Fifth Circumstance*

Section 2254(d)(3) provides that the presumption of correctness will not apply where "the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3) (1988). Like section 2254(d)(3), *Townsend*'s fifth circumstance requires a petitioner to show "the material facts were not adequately developed at the state court hearing. . . ." *Townsend*, 372 U.S. at 313, 83 S.Ct. at 757. *Townsend* also requires, however, that the petitioner demonstrate the failure to develop material facts was not due to his "inexcusable neglect." *Id.* at 317, 83 S.Ct. at 759. Only then is the petitioner entitled to an evidentiary hearing. Section 2254(d)(3) and *Townsend*'s fifth circumstance are not coextensive and thus our inquiry is two-fold. *See Smith v. Freeman*, 892 F.2d 331, 338-39, 339 n. 13 (3d Cir. 1989); *Streetman v. Lynaugh*, 812 F.2d 950, 959 (5th Cir. 1987); *Tucker v. Kemp*, 776 F.2d 1487, 1491 (11th Cir. 1985), *cert. denied*,

[14]Reyes alleges Hellewell failed to develop the "heart" of his case, but this contention is more appropriately analyzed under section 2254(d)(3), which states an exception to the presumption of correctness where "the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3) (1988). The next section will address the applicability of this exception.

478 U.S. 1022, 106 S.Ct. 3340, 92 L.Ed.2d 743 (1986); *Thomas v. Zant*, 697 F.2d 977, 986 (11th Cir. 1983).[15]

We must first determine whether the material facts supporting Reyes's legal claim were adequately developed in the state post-conviction court. As we explain, we believe the material facts were not adequately developed.[16]

The evidence submitted to the state post-conviction court consisted of a transcript of the plea proceeding. Sanchez's deposition and affidavit and Hawk's affidavit. Reyes was the only person who testified. The hearing focused on Sanchez's translation of the plea form and plea proceeding. There was almost no factual development of Reyes's claim that Sanchez had failed to translate the mens rea element of Manslaughter in the First Degree. Mr. Hellewell, Reyes's post-conviction attorney, merely directed the court's attention to various sections of Sanchez's deposition, attempting with his limited knowledge of Spanish to point out the inadequacies of Sanchez's translations. The State objected to Hellewell's discussion on the ground that he was not qualified as an

[15]Two of our decisions arguably have assumed section 2254(d)(3) and *Townsend*'s fifth circumstance pose the same test. *See Fritz v. Spalding*, 682 F.2d 782, 785 (9th Cir. 1982); *Griggs v. Superintendent Anchorage State Jail*, 469 F.2d 87, 88 (9th Cir. 1972) (per curiam). Since *Fritz* and *Griggs* do not clearly stand for this proposition, we are not bound by them.

[16]The district court's opinion doe snot clearly indicate if it reached the issue of whether the material facts were adequately developed. The court may have resolved Reyes's claim based solely on the second prong of *Townsend* by finding inexcusable neglect. In any event, we exercise our discretion to address the issue now, rather than remand it to the district court. *See Aguon v. Calvo*, 829 F.2d 845, 848 (8th Cir. 1987).

expert witness and Hellewell's presentation of the issue quickly disintegrated.

Even if Hellewell had been able to make sense of the information contained in the deposition, that information was inadequate to resolve the legal issue presented. In the deposition Sanchez was asked how he had defined manslaughter for Reyes. He relied he had translated it as "less than murder." On further questioning, Sanchez could not remember how he had translated the term "indifference." Moreover, Sanchez was *never even asked* how he had translated the term "recklessness."

The following passage from the record of the post-conviction hearing details Mr. Hellewell's attempt to make use of the deposition:

> *[Hellewell:]* Also in the deposition of Mr. Sanchez on page 11 and 12 there was an exchange there between himself and me concerning vocabulary for these terms. The two most important terms under consideration while this case was being considered at the trial level were murder and manslaughter. Those terms are quite difficult to understand to someone not schooled in the law and having a precise legal definition. Further, they are not capable of interpretation in the Spanish language by any single word because they—
>
> *[The State:]* Your Honor, I'm going to have to object to this unless Mr. Hellewell's putting himself forth as an expert witness. He's trying to provide this Court with testimony in regard to the application of the Spanish language and I don't think that's proper.
>
> *[The Court:]* The Court is aware of Mr. Hellewell's ability to communicate in the Spanish language.

> *[The State:]* However, Your Honor, we could bring in I don't know how many experts that we can bring in, if he wants to present himself as a witness to talk about what the terms means that are put down here. He's contesting this witness's ability to interpret by his own interpretations, and unless he's going to go on the record as a witness to do that, which he's already rested, then that's fine, but he can't sit here and say what the meaning of Spanish words are that Mr. Sanchez has translated in his deposition.
>
> *[The Court:]* Does this appear in the evidence anywhere?
>
> *[Mr. Hellewell:]* Yes, Your Honor. I can solve this problem by relying strictly on the words printed here in the transcript beginning at line 3 on page 11. Mr. Sanchez replied, "Murder, that he had killed somebody without the right to do so." I'd like the Court to be aware that that is a fairly complete but not entirely complete description of the term as we use it in our statutes. Then moving down to the foot of that page, Mr. Sanchez did explain those same words in Spanish spelling the words for the reporter.
>
> Moving to page 13, beginning at line 8, I asked him to describe his word for manslaughter. He responded on line 9 in Spanish that then he himself translated to English "that it was less than murder."
>
> I submit to the Court that that is a very brief, very incomplete description of the term for manslaughter.
>
> Following on that page is his spelling for the reporter in Spanish of the words used, but his interpretation is there on line 9, that it was less than murder.
>
> *[The Court:]* But you just referred to page 13, and I think you were actually on page 12.

[Mr. Hellewell:] Oh, yes. I beg your pardon. Page 12.

Mr. Hellewell's brief and unilluminating reference to the Sanchez deposition hardly indicates the material facts surrounding Reyes's claim were adequately developed. Hellewell could have developed these facts by a number of means, but did not. For instance, Hellewell did not call Sanchez to testify.[17] Nor did he call an expert witness to give an opinion on the accuracy of Sanchez's interpretations. Most strikingly, though Hellewell put Reyes on the stand, he did not ask him any questions relevant to the claim.[18] The colloquy quoted above, and Sanchez's deposition, constituted the chief evidence before the court. This evidence sheds little light on whether the mens rea element of manslaughter was correctly defined for Reyes. Thus, under section 2254(d)(3), the material facts relevant to Reyes's claim were not adequately developed, and the presumption of correctness does not apply here.

Nevertheless, under *Townsend*, Reyes is not entitled to a federal evidentiary hearing if the failure to develop the facts adequately is attributable to his "inexcusable neglect."

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[17]As pointed out at oral argument, it may be that Sanchez has forgotten how he translated the mens rea element of manslaughter (assuming he did at all). However, Hellewell still might have asked Sanchez presently to define the relevant terms for the court; if Sanchez had been unable to render accurate translations in that setting, such testimony would have tended to support the theory that Sanchez's earlier translations were deficient.

[18]We do not mean to intimate Hellewell necessarily should have pursued one or more of these avenues in developing the facts. We list the above opinions only for purposes of illustration.

Townsend, 372 U.S. at 317, 83 S.Ct. at 759. The district court found such neglect, but we believe it applied the wrong legal standard in reaching this conclusion.

At first blush, it might seem that every negligent failure of counsel to develop material facts is "inexcusable." But *Townsend* and the circuit cases interpreting it establish the contrary.

The *Townsend* Court defined "inexcusable neglect" by reference to the standard for procedural default articulated in *Fay v. Noia*, 372 U.S. 391, 438-39, 83 S.Ct. 322, 848-49, 9 L.Ed.2d 837 (1963). *Townsend*, 372 U.S. at 317, 83 S.Ct. at 759. Thus, inexcusable neglect will be found only where the petitioner has "*deliberately bypassed* the orderly procedure of the state courts." *Fay*, 372 U.S. at 438, 83 S.Ct. at 848 (emphasis supplied). A "deliberate bypass" occurs when

> a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures. . . .

Id. at 439, 83 S.Ct. at 849.[19]

Townsend illustrates the narrowness of this standard. In *Townsend*, petitioner had confessed to murder after being injected with a drug that arguably rendered his confession

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[19]The validity of the *Fay* standard has been questioned in other contexts, see *Tacho v. Martinez*, 862 F.2d 1376, 1380 (9th Cir. 1988), and *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 907 (9th Cir. 1986), but not in this context, where the issue is whether *Townsend* requires a federal evidentiary hearing.

involuntary. In the state court, petitioner's counsel did not adequately develop the fact that this drug had "truth serum" properties. Some testimony was adduced concerning the drug, but not enough to enable the court to grasp its true nature. Because this factual development was crucial to petitioner's constitutional claim, he was held to have passed the first prong of the test. Applying the inexcusable neglect prong, the Court stated: "And the medical expert's failure to testify fully cannot realistically be regarded as Townsend's inexcusable default." *Townsend*, 372 U.S. at 322, 83 S.Ct. at 762. Cases interpreting *Townsend* have reasoned that this statement indicates mere negligent failure to develop the facts adequately will not constitute inexcusable neglect.

In *Streetman v. Lynaugh*, 812 F.2d 950 (5th Cir. 1987), for instance, petitioner's counsel in state court was unprepared to conduct the habeas case and therefore failed to develop crucial facts bearing on the voluntariness of petitioner's confessions. The court held this was not inexcusable neglect, observing that "[i]t is well established that counsel's failure to marshall crucial evidence underlying a federal claim because of insufficient preparation or other neglect does not constitute a deliberate bypass." *Id.* at 960. Likewise, in *Guice n. Fortenberry*, 661 F.2d 496, 597 (5th Cir. 1981), the court could not discern from the record why counsel had failed to develop certain facts, but it concluded there had been no tactical decision to avoid presenting the evidence:

> It appears more likely that, based on the inartful and scattershot nature of the various motions, the defendants and their attorneys did not appreciate fully the relevance of the missing evidence. Such neglect is not inexcusable within the meaning of *Fay v. Noia*.

Id.; *see also Smith v. Freeman*, 892 F.2d 331, 340 (3d Cir. 1989); *Rogers v. Israel*, 746 F.2d 1288, 1295 n. 7 (7th Cir. 1984). We follow the decisions in these cases.[20]

In the present case, the magistrate recognized Reyes had asserted in his habeas petition that Hellewell "'simply failed to realize that the record of the Spanish translation he was creating was inadequate [for the post-conviction court] to evaluate Mr. Sanchez's performance.'" Again, in his written objections to the magistrate's recommendation, Reyes stated:

> If there is anything clear form the record in this case, it is that petitioner made no knowing and intelligent decision not to offer fully developed testimony regarding the failures of Mr. Sanchez's attempts at translation during the post-conviction proceedings. Postconviction counsel clearly made attempts to develop the record as recounted in petitioner's previous submissions to this court. Those efforts were woefully inadequate. A simple reading of the transcript of the post-conviction trial, without more, reveals both the inadequacy, and the clear lack of any willful design to bypass state procedure.

It appears the magistrate and district court acknowledged the truth of these allegations, but held that, even if Hellewell was simply negligent in failing to develop the facts, this could amount to inexcusable neglect. They erred in this respect. The standard for inexcusable neglect is deliberate bypass, and the case authority we have discussed demonstrates that a

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[20]We have found no Ninth Circuit decision directly on point.

counsel's negligent failure to develop the facts does not constitute a deliberate bypass.

Accordingly, we hold Reyes is entitled to a federal evidentiary hearing on the question whether the mens rea element of Manslaughter in the First Degree was properly explained to him.[21]

In cases where the presumption of correctness applies, a petitioner at an evidentiary hearing must "establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d) (1988). But where, as here, the presumption has been rebutted, the petitioner need only prove his constitutional claim by a preponderance of the evidence. *See Smith v. Freeman*, 892 F.2d 331, 341 (3d Cir. 1989); *Thomas v. Zant*, 697 F.2d 977, 989 (11th Cir. 1983).

C. Translation of the Plea Form and Plea Proceeding

Reyes's second constitutional claim is that Sanchez did not adequately translate the plea form and the plea proceeding.

Our review of the record convinces us that none of the three asserted exceptions to section 2254(d), or their analogs in *Townsend* is available. First, the state post-conviction court afforded Reyes ample opportunity to contest the translations of the plea form and plea proceeding. *See* 28 U.S.C. § 2254(d)(6) (1988), and *Townsend*'s sixth circumstances. Second, the material facts surrounding these two issues were adequately developed. *See* 28 U.S.C. § 2254(d)(3) (1988),

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[21]In light of our resolution of this case we have no occasion to examine Reyes's third asserted exception, based on section 2254(d)(8) and *Townsend*'s second circumstance.

and *Townsend*'s fifth circumstance. Third the state court's findings here are fairly supported by the record. *See* 28 U.S.C. § 2254(d)(8) (1988), and *Townsend*'s second circumstance. A federal evidentiary hearing is not necessary to explore this claim further.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSE TAMAYO-REYES,	)	
	)	
Petitioner,	)	Civil No. 88-6061-E
	)	
vs.	)	
	)	
J.C. KEENEY,	)	OPINION
	)	
Respondent.	)	

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REDDEN, Judge:

BACKGROUND

Petitioner filed a habeas proceeding under 28 U.S.C. section 2254 alleging that his plea of no contest to a charge of manslaughter in the first degree was involuntary and that

he received ineffective assistance of counsel. Respondent moved for summary judgment which Judge Hogan granted. Petitioner requested an evidentiary hearing "in order to adequately develop the material facts relevant to the case." Judge Hogan denied this action.

Magistrate Hogan filed his Findings and Recommendation on January 5, 1990. The matter is now before me pursuant to 28 U.S.C. section 636(b)(1)(B) and Fed. R. Civ. P. 72(b). When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. section 636(b)(1)(B); *McDonnell Douglas Corp. v. Commodore Business Machines*, 656 F.2d 1309, 1313 (9th Cir. 1981), *cert denied*, 455 U.S. 920 1982).

Petitioner has timely filed objections. I have, therefore, given the file of this case a de novo review. I ADOPT the Magistrate's Findings and Recommendation that respondent's motion for summary judgement (#10) be granted and petitioner's motion for an evidentiary hearing (#21) is denied.

DISCUSSION

Both of petitioner's claims are based on the contention that petitioner does not understand the English language and that the interpreter hired to intermediate between petitioner, his attorney and the court, did not adequately translate the proceedings or convey the necessary information to petitioner.

In petitioner's state post-conviction hearing, Judge Barber found that "petitioner was properly served by an interpreter" and "the interpreter correctly, fully and accurately translated the communications between petitioner and his attorney." Respondent argued that these findings (by Judge Barber) were

supported by evidence in the record and are binding on habeas review. Petitioner argued that the findings are not entitled to the presumption of correctness under 28 U.S.C. section 2254(d) and that he is entitled to an evidentiary hearing on the adequacy of the interpreter.

Judge Hogan held that the question of a voluntary plea is a question of law subject to review, but the historical facts and the inferences giving rise to those facts are entitled to a presumption of correctness. Petitioner objects to this conclusion arguing that the state court determination is not a "finding of historical fact but, rather, a legal or mixed factual-legal conclusion."

Judge Hogan is correct. He acknowledged in the paragraph prior to the one objected to by petitioner that "the question of a voluntary plea is a question of *law* subject to review in a section 2254 proceeding." (Emphasis added). He noted only that the underlying facts and inferences regarding those facts are entitled to a presumption of correctness. Judge Hogan relies on both the interpreter's affidavit and deposition which Judge Hogan found "supports the conclusion that petitioner was fairly apprised of the consequences of his plea."

Petitioner also objects to Judge Hogan's statement that the state court finding is "conclusive in this proceeding unless petitioner can establish entitlement to an evidentiary hearing under *Townsend*." (Citation omitted). Section 2254(d) states that a determination by a State court *shall presumed to be correct* unless the petitioner can demonstrate that one of eight listed conditions exist (ie, that the merits of the factual dispute were not resolved in the State court hearing), otherwise "the

burden shall rest upon the applicant to establish by *convincing evidence* that the factual determination by the State court was erroneous." Section 2254(d) (emphasis added). Here, Judge Hogan relies on the interpreter's affidavit, deposition and the state trial court record to conclude that there is ample evidence that petitioner's plea was knowing and voluntary.

The Supreme Court in *Townsend v. Sain*, 372 U.S. 293 (1963), holds that where the facts are in dispute, the federal court in habeas proceedings must hold an evidentiary hearing *if* the petitioner did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. "In other words a federal evidentiary hearing is required unless the state court trier of fact has, after a full hearing, reliable found the relevant facts." *Id.* at 312-13. *Townsend* then lists six circumstances where a federal court must grant an evidentiary hearing to a habeas applicant: if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence: (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. *Id.* at 313.

Judge Hogan then goes through the three *Townsend* factors identified by petitioner that he alleged entitled him to an evidentiary hearing. There are: (1) the material facts were not adequately developed; (2) he did not receive a full and

fair evidentiary hearing; and (3) the record does not support the factual findings. Petitioner argues that Judge Hogan confuses the 2254(d) factors and the *Townsend* factors. I disagree. Judge Hogan specifically analyzed each of the three *Townsend* factors that petitioner alleged applied to his case.

Petitioner next argues that Judge Hogan's analysis of the "full and fair hearing" factor is flawed. *Townsend* held that a petitioner does not receive a full and fair hearing when a state trial judge has made serious procedural errors in such things as the burden of proof. Or if a procedure used by the state trial court "appears to be seriously inadequate for the ascertainment of the truth. . . .," then the petitioner is allowed an evidentiary hearing.

Petitioner alleged that he was denied a full and fair hearing because "the heart of petitioner's case was not fully developed or presented." Petitioner does not allege that he was not provided an opportunity to develop his case, only that the case was not developed as he now thinks it should have been. Judge Hogan stated that he *reviewed the record* and found nothing to suggest that petitioner was "in any way precluded from offering expert evidence on the sufficiency of the translation in the post-conviction proceeding or otherwise developing his case." Under *Townsend*, this finding by Judge Hogan is sufficient to rule that an evidentiary hearing is not mandated.

Finally, petitioner objects to Judge Hogan's analysis finding that the material facts were adequately developed at the state court hearing. Judge Hogan correctly recites the standard in *Townsend* that in order to establish entitlement to an evidentiary hearing on this ground petitioner must demon-

strate that the failure to develop the crucial evidence was not attributable to inexcusable neglect. *Townsend* at 317. Petitioner argued in front of Judge Hogan that "apparently petitioner's post-conviction counsel simply failed to realize that the record of the Spanish translation he was creating was inadequate to evaluate [the interpreter's] performance." Judge Hogan concluded that that argument did not demonstrate that the failure to adequately develop the record was not attributable to inexcusable neglect.

Petitioner objects to that conclusion stating that Judge Hogan did not analyze or discuss the meaning of "inexcusable neglect" as a legal standard. However, Judge Hogan cited *Townsend* which cites *Fay v. Nola*, 372 U.S. 391, 438-39 (1963), where the term originated as used in this context. I find that is sufficient.

CONCLUSION

I ADOPT Judge Hogan's Findings and Recommendation in their entirety.

Dated this 5 day of March, 1990.

/s/ James A. Redden
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSE TAMAYO-REYES,	)	
	)	
Petitioner,	)	Civil No. 88-6061-E
	)	
v.	)	FINDINGS AND
	)	RECOMMENDATIONS
J.C. KEENEY,	)	
	)	
Respondent.	)	

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Salem, Oregon 97310
ATTORNEY FOR RESPONDENT

HOGAN, Magistrate:

Petitioner filed this proceeding under 28 U.S.C. § 2254 alleging that his plea of no contest to a charge of manslaughter in the first degree was involuntary and that his trial counsel was ineffective. Both of petitioner's claims are based

on the contention that petitioner does not understand the English language and that Mr. Sanchez, the interpreter hired to intermediate between petitioner, his attorney and the court, did not adequately translate the proceedings or convey the necessary information to petitioner.

Both the involuntary guilty plea claim and the ineffective assistance of counsel claim arise out of the same basic contention regarding the alleged inadequate interpretation of the proceedings. Therefore, the fact that petitioner arguably did not properly preserve his ineffective assistance of counsel claim on appeal to the Oregon Court of Appeals in irrelevant. The voluntariness issue was before the Court of Appeals.

Respondent moves (#10) for summary judgment. Petitioner moves that "an evidentiary hearing . . . be held in order to adequately develope the material facts relevant to the case." Memorandum in Opposition (#21), p. 15.

Following petitioner's state post-conviction hearing, Judge Barber found that "petitioner was properly served by an interpreter" and "(t)he interpreter correctly, fully and accurately translated the communications between petitioner and his attorney." Respondent's Return and Motion to Dismiss (#4), Exhibit C, p. 2.

Respondent contends that the findings by the post-conviction court are supported by evidence in the record and are binding on this court on habeas review. Petitioner argues that these findings are not entitled to the presumption of correctness under 28 U.S.C. § 2254(d) and that he is entitled to an evidentiary hearing on the adequacy of the interpreter.

The question of the voluntariness of a plea is a question of law subject to review in a section 2254 proceeding.

Marshall v. Lonberger, 459 U.S. 422, 431 (1983); *Iaea v. Sunn*, 800 F.2d 861, 864 (9th Cir. 1986). However, the historical facts and the inferences regarding those historical facts are entitled to a presumption of correctness. *Marshall v. Lonberger*, *supra*, at 431; *Iaea v. Sunn*, *supra*, at 864.

Petitioner's argument that findings are "in essence legal conclusions," Memorandum in Opposition (#21), p. 5, is not persuasive. If the proceedings were properly translated by Mr. Sanchez, petitioner's plea was not involuntary and his counsel was not ineffective. If the translation of the proceedings was inadequate, petitioner may be entitled to relief.

Due process is offended when a defendant is not fairly apprised of the consequences of his plea. See *Mabry v. Johnson*, 467 U.S. 504 (1984). In this case, the affidavit of Ben Sanchez (Respondent's Exhibit 104, p. 11) supports the conclusion that petitioner was fairly apprised of the consequences of his plea. See also Sanchez Deposition, Return and Motion to Dismiss (#4), Exhibit D, pp. 24-42. Thus the finding of the post-conviction court that petitioner's plea was knowing and voluntary is supported by ample evidence in the record. This finding was a determination after a hearing on the merits of a factual issue, 28 U.S.C. § 2254(d), and therefore conclusive in this proceeding unless petitioner can establish entitlement to an evidentiary hearing under *Townsend v. Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d). See *Sumner v. Mata*, 449 U.S. 539 (1981); *Sumner v. Mata*, 455 U.S. 591 (1982).

Petitioner argues that the state court findings are not entitled to a presumption of correctness and that he is entitled to an evidentiary hearing under *Townsend v. Sain*, *supra*, and

28 U.S.C. §§ 1, 3, and 8 because (1) the material facts were not adequately developed; (2) he did not receive a full and fair evidentiary hearing; and (3) the record does not support the factual findings.

I. Full and Fair Hearing:

28 U.S.C. § 3365(d)(2) and (d)(6) [the 3rd and 6th circumstances identified in *Townsend*] require an evidentiary hearing in a federal habeas corpus proceeding where the state court failed to afford the applicant a full and fair hearing. What constitutes a "full and fair hearing" has not been precisely defined. Arguably the full and fair hearing standard can be equated with a procedural due process requirement. See *Bashor v. Risely*, 730 F.2d 1228, 1232-1233 (9th Cir 1984). However, there is no clear authority for this position. It is clear that a federal hearing is not required if the habeas corpus applicant had an opportunity for a full and fair hearing in state court, whether or not he availed himself of it. *Neron v. Tierney*, 841 F.2d 1197, 1199 (1st Cir. 1988), cert. den. 109 S.Ct. 90, ___ U.S. ___.

Petitioner contends he was denied a full and fair hearing because "the heart of petitioner's case was not fully developed or presented." Memorandum in Opposition, p. 8. Petitioner does not allege that he was not provided an opportunity to develope his case, only that the case was not developed as he now thinks it should have been. There is nothing in the record to suggest that petitioner was in any way precluded from offering expert evidence on the sufficiency of the translation in the post-conviction proceeding or otherwise developing his case. Under these circumstances it

is not reasonable to conclude that the state court failed to afford the applicant a full and fair hearing.

Assuming that petitioner's alleged failure to adequately develope his translation argument on post-conviction in state court can be characterized as a waiver of a procedural right, petitioner has not established either cause and prejudice from the default, *Meeks v. Cabana*, 845 F.2d 1319, 1323 (5th Cir. 1988) or that the waiver was not attributable to petitioner's inexcusable neglect or deliberate by-pass. *Griffen v. Wainwright*, 760 F.2d 1505, 1516 (11th Cir 1985), citing *Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983).

II. Material Facts:

Petitioner also contends that the material facts concerning Sanchez's translation were not "adequately developed at the state court hearing." 28 U.S.C. § 2254(d)(3) [the 5th circumstance identified in *Townsend*]. However, in order to establish enforcement to an evidentiary hearing on this ground petitioner must demonstrate that the failure to develop the crucial evidence was not attributable to inexcusable neglect. See *Townsend v. Sain*, *supra* at 317. Petitioner argues that "(a)pparently (petitioner's) post-conviction counsel simply failed to realize that the record of the Spanish translation he was creating was inadequate to evaluate Mr. Sanchez's performance." Memorandum in Opposition (#21), pp. 14-15. This argument does not demonstrate that the failure to adequately develope the record was not attributable to inexcusable neglect.

III. Findings supported by the record:

The presumption of correctness will not be applied to factual findings "not fairly supported by the record." 28

U.S.C. § 2254(d)(8). As noted supra, the affidavit and deposition testimony of Ben Sanchez, Defendant's Exhibit 104, p. 11, and Exhibit D, pp. 24-42, supports the post-conviction court's finding regarding the adequacy of the translation.

SUMMARY: Based on all of the foregoing I find that the state court's finding of fact regarding the adequacy of the translation is entitled to a presumption of correctness and that petitioner is not entitled to an evidentiary hearing under *Townsend v. Sain*, or 28 U.S.C. § 2254(d). If the translation was accurate, and we are bound by the state court finding that it was, it follows that plaintiff was fairly apprised of the consequences of his plea and his plea of *nolo contendere* was voluntary. *Mabry v. Johnson, supra.*

Respondent's motion for summary judgment (#10) should be allowed and petitioner's motion for an evidentiary hearing (#21) should be denied.

DATED this 4th day of January, 1990.

/s/ Michael R. Hogan
UNITED STATES MAGISTRATE

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSE TAMAYO REYES,

Petitioner-Appellant,

v.

J.C. KEENEY, Superintendent,
Oregon State Penitentiary,

Respondent-Appellee.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A FEDERAL HABEAS CORPUS PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING WHEN THE STATE RECORD REVEALS THAT CRITICAL FACTS WERE NOT ADDUCED IN THE STATE COURT BECAUSE HIS COUNSEL WAS INADEQUATE.

90-35315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSE TAMAYO-REYES,

Petitioner-Appellant,

v.

J.C. KEENEY, Superintendent,
Oregon State Penitentiary,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Mr. Tamayo-Reyes is a Cuban immigrant with virtually no education. He is unable to read, write or speak English. Mr. Tamayo-Reyes was charged with intentional murder after a fight in a tavern. Mr. Tamayo-Reyes eventually changed his plea from not guilty of murder to no contest to manslaughter. At that proceeding Mr. Tamayo-Reyes was represented by an attorney who utilized the services of a Spanish speaking interpreter. The plea form which was utilized was written in English. Although

the interpreter spoke Spanish, he was inexperienced as an interpreter. He did not translate every word. His method of interpreting was to just tell Mr. Tamayo-Reyes what was happening.

During the change of plea hearing, Mr. Tamayo-Reyes stated that he did not understand. When asked whether he chose to waive his rights and plead no contest, Mr. Tamayo-Reyes equivocated. An off the record discussion was held after which the interpreter responded, "okay."

Mr. Tamayo-Reyes subsequently challenged the validity of the plea. He has maintained throughout the state and federal proceedings that he did not understand the nature of the proceedings, or understood the nature of the charge which was being discussed or that he was pleading guilty or waiving a trial. In the state post-conviction proceedings counsel attempted to make a record of the inadequacy of the interpretation during the plea proceeding to establish that Mr. Tamayo-Reyes did not understand what was taking place. The magistrate, district court and the Ninth Circuit all acknowledged that the efforts of counsel in the state post-conviction proceeding to establish a record were "woefully inadequate (app-23)."[1] Judge Trott, after a thoughtful analysis, concluded that Mr. Tamayo-Reyes was entitled to an evidentiary hearing in order to prove his claims.

---

[1] "app" refers to the appendix to the state's petition.

ARGUMENT

The state's petition for a writ of certiorari should be denied for several reasons. First, the opinion of the court below is well-reasoned and properly resolved the issues. Second, the state urges this Court to ignore settled precedent on the rules applicable in determining whether a habeas corpus petitioner is entitled to an evidentiary hearing in federal court. The cases from this Court and the circuits which have addressed the issue are in agreement on the standards to be employed. Third, the state's analysis is flawed in several important respects.

A. The United States Court of Appeals for the Ninth Circuit properly resolved the issues in Mr. Tamayo-Reyes case regarding the right to a hearing on the question of whether the mens rea element of manslaughter in the first degree was properly explained to him.

The court below reached its conclusion that Mr. Tamayo-Reyes is entitled to a federal evidentiary hearing only after detailed and cogent analysis. The opinion carefully explored the law of habeas corpus before addressing the facts of Mr. Tamayo-Reyes' case. The result reached by the court is compelled by the facts of this case and precedent.

Mr. Tamayo-Reyes is an immigrant of limited education and no English skills. He was found guilty of manslaughter on a plea of nolo contendere. He never admitted his guilt. The proceedings which resulted in his conviction were interpreted for him by an individual who had limited experience in interpreting. The interpreter did not carry out his functions in a professional

manner; he did not translate directly for Mr. Tamayo-Reyes. Instead, he merely told him what was going on. The finding of guilty of manslaughter was entered after Mr. Tamayo-Reyes had denied guilt, stated that he did not understand, completed a form which included a request to consider the testimony of witnesses, and did not have the elements of manslaughter explained to him. See Henderson v. Morgan, 426 U.S. 637 (1976).

Mr. Tamayo-Reyes federal claims are the same as those presented in the state post conviction proceedings. In state court, the attorney assigned to represent him failed in his responsibilities to adequately develop the factual record in support of the claim. No expert witness was called. The interpreter was not asked how he had translated several critical terms; indeed, he was not even called as a witness. The defendant was not asked "any question relevant to the claim." Judge Trott carefully noted counsel's failings in the opinion below (app. 21-22).

The failings of counsel and inadequacy of the record in this case are indistinguishable from the failings which were held to require a federal evidentiary hearing in Townsend v. Sain, 372 U.S. 293 (1963).

B. The standard set out in Townsend for determining when an evidentiary hearing should be ordered in a federal habeas corpus action has not been changed.

The state argues that the Ninth circuit's holding regarding the Townsend standard is incorrect (pet. 9). The court below correctly stated the legal standard. In Townsend, the Court

adopted the "inexcusable neglect" standard set out in Fay v. Noia, 372 U.S. 391 (1963), for use in determining whether an evidentiary hearing should be ordered in a federal habeas corpus petition. The holding in Townsend remains sound.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court limited the situations in which the inexcusable neglect standard of Fay v. Noia was applicable. There the Court held the "cause and prejudice" test would be applied to determine whether a habeas petitioner's procedural default in state proceedings would be excused. Wainwright v. Sykes did not address the question presented in Townsend of the standard to be used to determine whether an evidentiary hearing should be held in federal court. The Court did, however, cite Townsend approvingly in discussing the duty of federal courts to hold hearings "notwithstanding the prior resolution of the issues in state court." Wainwright v. Sykes, 433 U.S., at 80.

The continuing validity of the Fay v. Noia standard in other contexts is reflected in several recent cases. In Ford v. Wainwright, 477 U.S. 399 (1986), the Court explicitly applied and relied on Townsend in holding that a federal evidentiary hearing was required. The same term, in Murray v. Carrier, 477 U.S. 478 (1986), the Court addressed, inter alia, the contention that it was inappropriate to employ the cause and prejudice test to procedural defaults which occur on appeal. The Court examined the applicability of the Fay v. Noia standard and held that, on the facts presented it would not be applicable. Murray v.

Carrier, 477 U.S., at 492. The Court expressed no opinion as to whether the Fay v. Noia standard might be applicable in a case in which no appeal at all was taken. More recently in McCleskey v. Zant, __U.S.__ 113 L.Ed.2d 517 (1991), the Court considered the standard applicable in considering when a successive habeas corpus petition should be permitted. The Court concluded that the abuse of the writ doctrine "implicates nearly identical concerns" as the doctrine of procedural default and that cause and prejudice must be shown before a successor petition should be permitted. In reaching that conclusion, the Court examined the various potential standards. The discussion reveals the continuing validity of Fay v. Noia in some contexts. There is no split in the circuits on the use of the Townsend and Fay v. Noia standards in the situations present in Mr. Tamayo-Reyes' case. See Yackle, 1 Post-Conviction Remedies Cumulative Supplement at 147-149 (1991); Liebman, Federal Habeas Corpus Practice and Procedure, Vol. 1, pp. 286-287 (1988).

C. The state's analysis is flawed in several important respects.

The analysis presented in the state's petition for a writ of certiorari is flawed in several important respects. At pages 7-9 of their petition, the state discusses principles of comity and raises concerns about proliferation of evidentiary hearings if the Townsend standard is applied. The state's argument ignores the fact that the Townsend standard has been followed throughout the country for more than two decades. There is no evidence that it has led to a proliferation of evidentiary hearings in habeas

it has led to a proliferation of evidentiary hearings in habeas corpus cases. To the contrary, all indications are that evidentiary hearings are the exception rather than the rule. See Liebman, supra, at 261 and sources cited therein. The state is asking the Court to change the law to address a "problem" that does not exist.

The state's argument misconstrues the nature of the writ of habeas corpus. Habeas proceedings are not appeals. They are, rather, intended to include evidentiary hearings. See, e.g., Ford v. Wainwright, supra 477 U.S., at 410; 28 U.S.C. 2243, 2254 (d); Rules 6-8 of the Rules Governing Section 2254 Cases in the United States District Courts.

Contrary to the state's argument, the Courts and Congress have given a great deal of deference to the states in structuring the habeas corpus remedy. No additional protection is needed in the form of a rule further limiting federal evidentiary hearings. The presumption of correctness incorporated in 28 U.S.C. 2254 (d) directly addresses significant federalism concerns. The statute strikes an appropriate balance between the interests of the states and the responsibilities of the federal courts in examining the constitutional validity of state convictions. When hearings are granted under the Townsend standard, the interests of the states are well protected.

The state's reference to Pennsylvania v. Finley, 481 U.S. 551 (1987), misapprehends its import. That case does not, as the state asserts (pet. 9), prohibit a federal petitioner from

asking a federal court to ignore state fact findings on collateral review because of counsel's negligence. To the extent that Finley deprives state post-conviction petitioners of counsel or effective counsel it renders federal habeas review even more important. The state's argument would severely undermine the right to collateral review.

In arguing that Wainwright v. Sykes rejected the inexcusable neglect standard (pet 9-11) the state confuses the different policy considerations underlying the doctrine of exhaustion of remedies and the right to a federal evidentiary hearing. Fay v. Noia dealt with the question of procedural default in the state courts. Wainwright v. Sykes rejected its standard only in that context. The requirement that a federal habeas petitioner avail himself of state procedures is designed to ensure that the interests of the states are protected and that the federal courts do not unduly intrude in state proceedings. In Wainwright v. Sykes the Court noted the critical distinction between the requirement that federal petitioners comply with state procedural rules and the right to have a hearing in federal court after such compliance.

> [I]t has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination on the merits of that claim reached in the state proceedings. This rule of Brown v. Allen is in no way changed by our holding today. Rather, we deal only with contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure. (emphasis added).

Wainwright v. Sykes, 477 U.S., at 87. The state's analysis blurs this distinction.

Finally, the position advanced by the state would read subsection (3) out of 28 U.S.C. 2254 (d) and eliminate the fifth of the Townsend situations in which a federal hearing is required. Both the statute and Supreme Court precedent requires federal hearings when one of a number of circumstances exist, including a defective fact-finding procedure, failure of the state fact-finder to address the merits of a claim, lack of jurisdiction, or failure to provide counsel. These circumstances describe situations which would fit within the definitions of "cause" found in Murray v. Carrier, supra 477 U.S., at 488, "..an objective factor external to the defense.." The circumstance involving the failure to develop material facts addresses concerns which should remain distinct and not be permitted to be shown only when "external factors" are also present.

CONCLUSION

For all of the reasons set forth herein the states petition for a writ of certiorari should be denied.

DATED this June 27, 1991.

Steven T. Wax
Attorney for Petitioner-Appellant

90-35315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

JOSE TAMAYO REYES,

Petitioner-Appellant,

v.

J.C. KEENEY, Superintendent,
Oregon State Penitentiary,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE AND MAILING

I, Steven T.Wax, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within Brief In Opposition on the counsel for the respondent by depositing in the United States Post Office at Portland, Oregon on June 27, 1991, first class postage prepaid, a certified true, exact and full copy thereof addressed to:

Virginia Linder, Solicitor General
400 State Office Building
Salem, OR 97310

Further, the original and one copy was mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street NE Washington, DC, 20543, for filing on June 27, 1991, with first-class postage prepaid.

DATED this June 27, 1991.

Steven T. Wax

Steven T.Wax
Attorney for Petitioner-Appellant

SUBSCRIBED AND SWORN TO before me this June 27, 1991.

stw\jtr\p1

OFFICIAL SEAL
ROBIN R. RUHAAK
NOTARY PUBLIC - OREGON
COMMISSION NO. 006401
COMMISSION EXPIRES APR. 28, 1995

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June 27, 1991

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The Honorable William K. Suter
Clerk, United States Supreme Court
1 First Street NE
Washington, DC 20543

Re: Jose Tamayo Reyes v. J.C. Keeney

Dear Mr. Suter:

Enclosed for filing please find the original and one copy of petitioner's Brief in Opposition in the above-referenced case.

Thank you for your attention to this matter.

Sincerely,

Steven T. Wax
Federal Public Defender

STW:cm(supct.ltr)

Enclosure

cc: Virginia Linder, Solicitor General

Supreme Court, U.S.
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(3)

No. 90-1859

In the Supreme Court of the United States

OCTOBER TERM, 1990

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

Tamayo-Reyes' argument rests on two related but separate propositions. First, he argues that the Ninth Circuit correctly recognized "[t]he continuing validity of the *Fay v. Noia* [372 U.S. 391 (1963)] standard." (Br. in Opp. 5). Second, he argues that the question in this case differs from the question in *Wainwright v. Sykes*, 433 U.S. 72 (1977). This reply will address these two arguments first. It then will discuss the reasons Tamayo-Reyes advances against granting certiorari.

As Tamayo-Reyes recognizes, the court of appeals' decision rests on the proposition that *Fay*'s deliberate by-pass standard is still good law. He asserts accordingly that this Court's recent cases "revea[l] the continuing validity of *Fay v. Noia* in some contexts." (Br. in Opp. 6; *see id.* at 5). The difficulty with Tamayo-Reyes' position is that shortly before he filed his brief in opposition, the Court overruled *Fay*. *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4795-4797 (U.S., 1991).[1] *Coleman* expressly deprives *Fay*'s deliberate by-pass standard of any validity it might have retained and negates the premise on which both the court of appeals' decision and Tamayo-Reyes' argument rest.

Tamayo-Reyes argues, however, that the issue presented by this case and *Townsend v. Sain*, 372 U.S. 293 (1963), differs from the issue presented in *Wainwright* and presum-

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[1] Although *Coleman* was decided before Tamayo-Reyes filed his brief in opposition, he presumably was unable to learn what the opinion said until after the brief in opposition had been filed.

ably *Coleman*.[2] It follows, he contends, that even if cause and prejudice applies to the failure to raise an issue in state court, deliberate by-pass should still govern the failure to present material evidence in the state proceeding. The initial problem with this argument is that it is inconsistent with *Townsend*'s reasoning. *Townsend* recognized that the same standard should apply in both situations.

In determining when a federal habeas petitioner should be excused for failing to develop material facts in the state court proceeding, *Townsend* adopted the same standard *Fay* used to determine when a habeas petitioner should be excused for failing to appeal from a state court ruling. 372 U.S., at 317. *Townsend* concluded that *Fay*'s deliberate by-pass standard struck the proper balance between the federal and state interests in both situations. *Ibid*. *Townsend* did not find that the state and federal interests in each situation differed. Rather, it concluded that the identical standard was appropriate in both.

Since *Townsend*, the Court has held that *Fay*'s deliberate by-pass standard gives too little weight to the States' interest in the finality of criminal convictions and in ensuring that state proceedings remain the focus of a criminal defendant's efforts. *Coleman v. Thompson*, *supra*, 59 U.S.L.W., at 4795-4797; *Wainwright v. Sykes*, 433 U.S., at 90. Cause and prejudice instead strikes the proper balance. *Ibid*. If, as *Townsend* recognized, the same standard should apply to the failure to develop material facts in the state court that applies to the failure to raise an issue, then it follows that cause and prejudice applies here with the same force that it applies in *Wainwright* and *Coleman*.

[2] In *Wainwright* and *Coleman*, the federal habeas petitioner failed either to raise a federal issue in state court or to file a timely appeal from the state trial court's resolution of the federal issue he did raise. In this case, the federal habeas petitioner failed to present evidence to the state post-conviction court that he now claims was material to the state court's accurate resolution of the federal issue he raised.

Beyond *Townsend*'s recognition that the standard should be identical, the same concerns that caused the Court to apply a cause and prejudice standard to the failure to raise an issue are equally applicable here. Whether a federal habeas petitioner fails to raise an issue in state court or fails to present the evidence necessary for the state court to resolve the issue he does raise, the effect is the same. The state court is deprived of an effective opportunity to rule on the federal claim in each instance. The State's interest in ensuring a full and accurate resolution of the federal claims a criminal defendant raises is no different from its interest in ensuring that he raise the federal claim in the first place, as the Court's reasoning in *Murray v. Carrier*, 477 U.S. 478, 487 (1986), makes clear.

In considering the costs a procedural default imposes on the States, the *Murray* Court explained:

> Those costs, which include a reduction in the finality of litigation and the frustration of "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," [*Engle v. Isaac*, 456 U.S. 107, 128 (1982)], are heightened in several respects when a trial default occurs: the default deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives

> state appellate courts no chance to review trial errors, and "exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.*, at 129.

Murray v. Carrier, *supra*, at 487. The costs to the State are the same here. Failure to present evidence material to the resolution of a criminal defendant's federal claim deprives the state court of an effective opportunity to correct the claimed error, detracts from the importance of the state proceedings, gives state appellate courts no reason to question the trial court's resolution of the defendant's federal claim, and "exacts an extra charge by undercutting the State's ability to enforce its procedural rules" that require a litigant to bring forth all relevant evidence at the state hearing.[3]

It would make little sense to hold a criminal defendant responsible for raising all federal issues in state court (or show cause and prejudice for failing to do so) but not hold him equally responsible for presenting all evidence material to the resolution of those claims to the state court. If, absent deliberate by-pass, a federal habeas petitioner can avoid the force of the state court fact findings, then the state trial on the merits will be reduced to "a 'tryout on the road' for what will

[3] These interests are expressed at a criminal defendant's trial by the rules limiting both the reasons and the time in which a criminal defendant may ask the court to grant a new trial based on newly discovered evidence. Or. Rev. Stat. § 136.515; Or. R. Civ. P. 64. Similar rules limit a state post-conviction petitioner's ability to submit newly discovered evidence. *See* Or. R. Civ. P. 64. Finally, Oregon statutes limit a convict to only one post-conviction proceeding, thus expressing the state's interest in ensuring that all issues and evidence be presented at one post-conviction hearing. *See* Or. Rev. Stat. § 138.550(3).

later be the determinative federal habeas hearing," contrary to the reasoning in *Wainwright v. Sykes*, 433 U.S., at 90. Similarly, the State's interest in ensuring finality, which the Court found controlling in *Coleman*, would be subverted whenever a federal habeas petitioner can think of a material fact that his counsel negligently (or even purposefully under the Ninth Circuit's decision) forgot to introduce at the state trial.[4] Although the issue presented here is not identical to the issue in *Wainwright*, there is no substantive difference between the two. Tamayo-Reyes errs in arguing that the two should be subject to a different standard.

Tamayo-Reyes' brief in opposition finally suggests a number of reasons why certiorari is not warranted. This reply will address each briefly. First, Tamayo-Reyes argues that there is no conflict in the circuits. The conflict, however, is between the Ninth Circuit's adherence to *Fay*'s deliberate by-pass test and the Court's express rejection of *Fay* in *Wainwright*, *Murray*, and most recently *Coleman* — a conflict commentators have noticed. *See* YACKLE, POSTCONVICTION REMEDIES 435 (1981). Because *Coleman* overrules the premise on which the Ninth Circuit's holding rests, the State respectfully suggests that it would be appropriate to grant certiorari, vacate the judgment, and remand for reconsideration in light of *Coleman*.

[4] Because the Ninth Circuit would excuse every failure to present material evidence except a deliberate decision by the habeas petitioner himself, trial counsel could deliberately choose to withhold evidence at the state hearing without affecting his or her client's right to a federal evidentiary hearing.

Second, Tamayo-Reyes refers to the court of appeals' "thoughtful analysis," its "detailed and cogent analysis," and its "carefu[l] explor[ation of] the law of habeas corpus," presumably to demonstrate that the court of appeals resolved this issue correctly. (Br. in Opp. 2-3). Tamayo-Reyes fails to mention that the court of appeals' opinion passes over, in a footnote, the question presented by the petition for certiorari — whether cause and prejudice or deliberate by-pass is the proper test. *See Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1501 n.19 (9th Cir. 1991). The court of appeals never cites *Wainwright*, *Murray*, or any of the Court's cases that question *Fay*'s continuing validity. However cogent the rest of the Ninth Circuit's analysis may be, the opinion appears to have relegated the difficult issues to cursory treatment in a footnote.

Third, Tamayo-Reyes argues that using a deliberate by-pass standard presents no real problem because "all indications are that [federal] evidentiary hearings are the exception rather than the rule." (Br. in Opp. 7). The difficulty with Tamayo-Reyes' argument is that the treatise he cites contradicts rather than supports his claim. What the treatise says is that federal courts have rarely granted habeas relief without holding an evidentiary hearing. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 20.1, at 261 (1988). It does not say that federal evidentiary hearings are the exception, as Tamayo-Reyes states. And the treatise urges habeas petitioners to seek federal evidentiary hearings in every case, except for the "rare circumstances when the state

court record and findings require relief as a matter of law." *Id.*, at 263.[5]

Far from suggesting that few evidentiary hearings are or should be held, the treatise on which Tamayo-Reyes relies would convert every petition for federal habeas into a new evidentiary hearing. Nor can Tamayo-Reyes argue that the Ninth Circuit's rule, if applied literally, would not allow virtually every habeas petitioner to have a federal court redecide the facts the habeas petitioner already had a full and fair opportunity to litigate in state court. There will be few cases in which a federal habeas petitioner cannot think of how his state counsel could have tried his case better.

Fourth, Tamayo-Reyes argues that the State has "misconstrued the nature of the writ of habeas corpus. Habeas proceedings are not appeals." (Br. in Opp. 7). While the second sentence is true, the Court has recognized that questions of comity and federalism require federal courts to defer to state court fact findings where appropriate, and the question is when federal courts should defer. All the State's argument would do would be to provide symmetrical treatment to a habeas petitioner's failure to raise an issue and his failure to make a complete record on the issues he did raise.

Fifth, Tamayo-Reyes argues that applying a cause and prejudice standard would read "subsection (3) out of 28 U.S.C. 2254(d) and eliminate the fifth of the *Townsend* situations in which a federal hearing is required." Tamayo-Reyes overstates his case. *Townsend v. Sain*, 372 U.S. 293, 317 (1963), recognized that it would subvert federal-state

---

[5]Liebman's treatise is written from an adversarial perspective.

relations if every failure to develop a material fact in the state proceedings entitled a habeas petitioner to a federal evidentiary hearing. *Townsend* concluded that *Fay*'s deliberate by-pass standard struck the proper balance. Subsequent cases have recognized that cause and prejudice better serves the interest *Townsend* sought to protect. Recognizing a cause and prejudice standard here would not eliminate the fifth *Townsend* situation, as Tamayo-Reyes argues. Rather, it would simply adjust the balance *Townsend* sought to preserve and bring it in line with the Court's more recent decisions.

Sixth, Tamayo-Reyes' brief in opposition recasts the facts in such a way to suggest that it would be unjust to deny him a new evidentiary hearing. Holding that cause and prejudice is the proper standard, however, would not necessarily mean that Tamayo-Reyes would not receive a hearing. Rather, it would only mean that the district court could test his claim on remand under the proper standard. Moreover, the facts stated in the brief in opposition are not always completely accurate.

To be sure, the facts are not material when, as in this case, the question is what the correct legal rule is, but it never hurts to get the facts right. Tamayo-Reyes' brief says, for example, that during the plea hearing in state court, Tamayo-Reyes stated he did not understand, conferred off the record, and later responded, "Okay" through the interpreter. (Br. in Opp. 2). The brief fails to mention that after Tamayo-Reyes responded "Okay," the state trial court took pains to clarify his response. It asked whether he now understood the choice between going to trial and pleading, to which Tamayo-Reyes replied yes. It asked whether he choose to be convicted of manslaughter without a jury trial, to which Tamayo-Reyes

replied yes. And it asked him whether he knew that his plea could lead to his being deported, to which Tamayo-Reyes replied yes. Tamayo-Reyes' brief never mentions that the state trial court accepted his plea only after confirming that Tamayo-Reyes did in fact understand what he was doing.

The point is not to suggest that the question presented by the State's petition turns on the particular facts of this case. The petition does not question the application of a settled principle to specific facts. Rather, it questions whether the Ninth Circuit has announced the right principle. This reply notes one of the apparent misstatements in the brief in opposition only to suggest that the brief's factual assertions are not always completely trustworthy.

CONCLUSION

For the reasons stated above and in the petition for certiorari, certiorari should be granted and the judgment reversed.

Respectfully submitted,
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OCTOBER TERM, 1991

J.C. KEENEY,

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v.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the
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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 3, 1991
CERTIORARI GRANTED OCTOBER 7, 1991

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The following opinions have been omitted in printing this appendix because they appear on the following pages of the printed petition for certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Feb. 8, 1988 — Petition for writ of habeas corpus filed.

Oct 17, 1988 — Respondent Keeney's motion for summary judgment.

June 16, 1989 — Tamayo-Reyes' motion to allow filing of memorandum to the summary judgment motion and requesting an evidentiary hearing.

June 16, 1989 — Tamayo-Reyes' memorandum in opposition to respondent's motion for summary judgment motion and in support of his request for an evidentiary hearing.

Sept. 20, 1989 — Keeney's response to Tamayo-Reyes' request for an evidentiary hearing.

Jan. 5, 1990 — Magistrate's Findings and Recommendation, respondent Keeney's motion for summary judgment should be allowed and petitioner Tamayo-Reyes' motion for evidentiary hearing should be denied

Jan. 19, 1990 — Tamayo-Reyes' objections to Magistrate's Findings and Recommendation

Mar. 5, 1990 — United States District Court's Opinion adopting Findings and Recommendation.

Mar. 5, 1990 — United States District Court's Order adopting the Magistrate's Findings and Recommendation.

Mar. 7, 1990 — Judgment.

Apr. 4, 1990 — Notice of appeal by Tamayo-Reyes.

Apr. 9, 1990 — Certificate of probable cause issued.

Mar. 4, 1991 — Ninth Circuit's Opinion.

June 3, 1991 — Petition for certiorari filed.

Oct. 7, 1991 — Certiorari granted.

TRANSCRIPT OF STATE COURT HEARING

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

-oOo-

STATE OF OREGON	)	
Plaintiff,	)	
vs.	)	No. C84-09-33779
JOSE TAMAYO-REYES,	)	
Defendant.	)	

-oOo-

PROCEEDINGS

Tuesday, December 11, 1984

Before:

HONORABLE ROBERT W. REDDING, Circuit Court Judge

APPEARANCES:

Ms. Helen Smith, Deputy District Attorney,
On behalf of the State of Oregon.

Mr. Tommy Hawk, Attorney at Law,
On behalf of the Defendant.

Mr. Ben A. Sanchez, Interpreter.

-oOo-

[2]

MORNING SESSION

THE COURT: Thank you. We'll be back in session.

MS. SMITH: Good morning, your Honor. This is State of Oregon versus Jose Tamayo-Reyes, C84-09-33779. Mr. Tamayo-Reyes is before the Court this morning with Counsel, Mr. Tommy Hawk. Helen Smith appearing on behalf of the State of Oregon. Also present is the interpreter, Mr. Sanchez.

We are before the Court at this time for a change of plea. I am forwarding to the Court the petition to enter the plea, the order entering the plan, a waiver of jury trial, and the police reports.

THE COURT: Did you use one of our Spanish language plea petitions?

MR. HAWK: No, we did not, Your Honor. I had Mr. Sanchez translate the English form, from English to Spanish, directly to the defendant in my presence. Mr. Sanchez went over the form with him in Spanish. I asked him if he understood it. He indicated he did understand it, and did wish to proceed as we contemplate proceeding this morning.

THE COURT: Mr. Sanchez, you're a member of the Oregon State Bar.

THE INTERPRETER: Yes, Your Honor.

THE COURT: And you speak, read, and write Spanish

[3]

fluently?

THE INTERPRETER: I do not write or read Spanish. I only speak it.

THE COURT: Did you read this plea petition to Mr. Reyes in Spanish?

THE INTERPRETER: Yes, I did, Your Honor.

THE COURT: In your judgment, did he understand what you read to him?

THE INTERPRETER: Yes, he so indicated, Your Honor.

THE COURT: And in your judgment, did he make a knowing and voluntary waiver of all of the rights that are explained in the plea petition?

THE INTERPRETER: He indicated he understood and waived them, yes, Your Honor.

THE COURT: And do you understand it to be his choice — or did he express to you the choice to have this conviction go on his record, rather than having a jury trial?

THE INTERPRETER: Yes, Your Honor.

THE COURT: Mr. Reyes — would you ask Mr. Reyes for me: Mr. Reyes, did Mr. Sanchez explain your rights to you in Spanish?

THE WITNESS: (Through the interpreter.) Yes.

THE COURT: Do you have any questions about your rights?

[4]

THE WITNESS: No.

THE COURT: You understand that you're presumed to be innocent?

THE WITNESS: Yes.

THE COURT: You have the right to a jury trial. The state would have the burden of proving you were guilty beyond any

reasonable doubt. You'd have the right to remain silent, but you could testify if you want to. You could call witnesses to testify for you. You could subpoena those witnesses to make them appear. You could cross-examine all of the state's witnesses. You could be assisted throughout the trial by your lawyer, Mr. Hawk, and be assisted by an interpreter, Mr. Sanchez.

If you were convicted, you would have certain rights of appeal. But if you plead no contest to this charge, you'll be giving up all of those rights, and this conviction will be on your record just as if you were convicted at trial. The maximum penalty, whether you were convicted by a jury, or plead no contest, is 20 years. And that penalty is the same whether you plead no contest or were convicted by a jury. Do you understand what I've explained to you?

THE WITNESS: More or less.

THE COURT: Do you have any questions that you want to ask me?

[5]

THE WITNESS: No.

THE COURT: Do you choose to plead no contest and have the conviction go on your record, rather than have a jury trial?

THE INTERPRETER: He doesn't know anything about such things.

THE COURT: Do you choose to have this conviction for manslaughter, rather than have a jury trial?

THE INTERPRETER: He says, "I don't comprehend."

THE COURT: You have two choices: You can have a jury trial on the charge of murder, or you can be convicted at this time, by your agreement, of the charge of manslaughter.

MR. HAWK: May I have a moment Your Honor?

(Discussion held off the record between Mr. Hawk, Mr. Tamayo-Reyes and Mr. Sanchez.)

THE INTERPRETER: He says, "Okay."

THE COURT: Mr. Reyes, do you now understand the choice between having a jury trial on the charge of murder —

THE WITNESS: (Through the interpreter.) Yes.

THE COURT: And you choose to be convicted today of the charge of manslaughter, without a jury trial?

THE WITNESS: Yes.

THE COURT: And Mr. Reyes, you understand that this

[6]

could lead to your being

expelled from the United States?

THE INTERPRETER: Yes, he understands.

THE COURT: This wasn't included on the plea petition, and by statute it's supposed to be.

MS. SMITH: I thought it was stamped on it somewhere.

THE COURT: It's not.

MR. HAWK: I point out, Your Honor, that one of the things that we did discuss, myself, Mr. Sanchez, and the defendant, in some detail yesterday, was the fact that there would be Immigration Service implications to this, and we trial to anticipate what they would be. So that is something that the defendant is aware of.

THE COURT: Did you speak to him about the possibility that he could be held, in effect, in custody by the Immigration people?

MR. HAWK: We told him in all likelihood, at the expiration of whatever term of confinement he had in Oregon, that he would go directly to a federal institution in Atlanta, and be incarcerated there. We told him we didn't know how long that would be, but that would be certain to happen.

His concern was — well, he understood that. He understood that that was going to happen.

THE COURT: How long could he possibly be held

[7]

there?

MR. HAWK: I understand, through conversations with the state, that the present policy of the government is to retain persons such as Mr. Reyes, no longer than a six-month period; is that correct?

MS. SMITH: That's what I was informed by Immigration, after we had our conversation, Your Honor. We were both initially under the impression that we put them there and left them, although I found that pretty hard to believe. When I talked to Immigration, they told me since he's from Cuba, and can't be deported back to Cuba, the best I could expect was they would take him over to Atlanta and that he'd do about six months, and then he'd be released.

MR. HAWK: It was put to him that that's what we anticipate would happen. I don't quite frankly think any of us can tell him exactly, but I suppose just physics tells us you can't keep putting people there without letting any of them out, without expanding the size of the facility. That's just the best information we can provide him.

THE COURT: And on the jury trial waiver, did you read that to Mr. Reyes in Spanish?

THE INTERPRETER: I did. I explained it to him, Your Honor.

[8]

THE COURT: And he signed that knowing that he was giving up his right to jury trial by signing that?

THE INTERPRETER: Yes, Your Honor.

MR. HAWK: That was also done in my presence, Your Honor, and I executed it after the Spanish recitation.

THE COURT: It appears that this morning Mr. Reyes understands all of the rights that I've gone over with him, and that are explained in the plea petition, and he's making a knowing and voluntary waiver of those rights and chose to plead no contest and accept the consequences of a conviction for manslaughter in the first degree.

It appears further that there's a factual basis to support that plea, based on the evidence that I've heard at the prior bail hearing and suppression hearing.

I'm going to accept the plea of guilty to the manslaughter in the first degree charge, and order a pre-sentence report.

MR. HAWK: In that regard, Your Honor, I would like to advise the Court that a pre-sentence has been prepared on a related offense in this county, which may expedite the time period for us all. That was recently prepared, and completed, and furnished to Mr. Sanchez in the last week or so.

THE COURT: I'll set it for the 22nd at 9:00

[9]

o'clock for sentencing.

MR. HAWK: Are you talking about this month, or next month?

THE COURT: No. Pardon me, the 22nd of January. Are you both going to be available?

THE INTERPRETER: Yes, I will be.

MR. HAWK: What time again, Your Honor, on the 22nd?

THE COURT: 9:00 a.m.

MR. HAWK: 9:00 a.m.

THE COURT: Thank you.

MR. HAWK: Thank you, Your Honor.

(Hearing adjourned.)

PLEA PETITION

In the Circuit Court of the State of Oregon
for Multnomah County

STATE OF OREGON
Plaintiff,

vs. C C84-09-33779

CA No. 9000 48

Jose Tamayo-Reyes
Defendant

PETITION TO ENTER PLEA
OF ~~GUILTY~~ NOLO CONTENDERE[1]

The defendant represents to the Court:

1. My full true name is: Jose Tamayo-Reyes
and I am also known as: _____
and I request that all proceedings against me be had in my true name.

2. I am represented by a lawyer, his name is Tommy Hawk

3. I wish to plead ~~GUILTY~~ Nolo Contendere to the charge(s) of manslaughter I (1st Degree) lesser included offense in Indictment

4. I told my lawyer all the facts and circumstances known to me about the charges against me. I believe that my lawyer is fully informed on all such matters. My lawyer has counselled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses that I might have in this case.

[1]Throughout this petition, portions of the petition form which were manually filled in or manually substituting crossed-out language are indicated by underscoring.

5. I understand that I may plead "Not Guilty" to any offense charged against me. If I choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury, (b) the right to see, hear and face in open court all witnesses called to testify against me. (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor, and (d) the right to have the assistance of a lawyer at all stages of the proceedings, and (e) also the right to take the witness stand at my sole option; and, if I do not take the witness stand, I understand the jury will be told that this may not be held against me.

6. I also understand that if I plead ~~"GUILTY"~~ "Nolo Contendere" the Court may impose the same punishment as if I had plead "Not Guilty", stood trial and been convicted.

7. I know that if I plead ~~"Guilty"~~ "Nolo Contendere" to this charge (these charges), the maximum possible sentence is (20) twenty years imprisonment and/or a fine of $100,000. I know also that the sentence is up to the Court. The District Attorney will take no part other than providing to the Court, Police Reports and other factual information as requested by the Court, and the District Attorney shall make no recommendations to the Court concerning my sentence except as follows Twenty years — 8 (eight) year minimum

8. I have ☒ have not ☐ been convicted of one or more felonies in the past as follows: awaiting sentence — Mult Co — Theft I (1/25/85 sentencing (J Olsen)[)]

9. I am ☐ am not ☒ presently on probation or parole. I understand that by pleading guilty in this case this may cause revocation of my probation or parole, and that this could result

in a sentence of _____ years in that case. I further understand that if my parole or probation is revoked, any sentence in that case may be consecutive to or in addition to any sentence in this case.

10. I also know that the law provides for an increase in the maximum sentence described in Paragraph 7 to a maximum of 30 years if I qualify as a dangerous offender. I understand that this may happen in this case. ☐ If not applicable, check ☒

11. I am 36 years of age. I have gone to school up to and including no formal education ; my physical and mental health is presently satisfactory. At this time I am not under the influence of any drugs or intoxicants (nor was I at the time the crime was committed), except: under the influence of alcohol at time of incident

12. I declare that no officer or agent of any branch of government (Federal, State or local) has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I will receive a lighter sentence or probation, or any other form of leniency if I plead ~~"GUILTY"~~ "Nolo Contendere" except: I will not be charged with murder but may plead "Nolo Contendere" to Manslaughter I

13. I believe that my lawyer has done all that anyone could do to counsel and assist me. I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME; I recognize that if I have been told by my lawyer that I might receive probation or a light sentence, this is merely his prediction and is not binding on the Court.

14. I plead ~~"GUILTY"~~ Nolo Contendere and request the Court to accept my plea of ~~"GUILTY"~~ Nolo" and to have entered my plea of ~~"GUILTY"~~ "Nolo" on the basis of (please

write in operative facts) I request court to consider testimony of witnesses who testified during my bail hearing as factual basis for my plea.

15. I OFFER MY PLEA OF ~~"GUILTY"~~ "Nolo Contendere" FREELY AND VOLUNTARILY AND OF MY OWN ACCORD AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET FORTH IN THE INDICTMENT AND IN THIS PETITION AND IN THE CERTIFICATE OF MY LAWYER WHICH FOLLOWS.

16. I further state that I wish to waive the reading of the indictment or information in open court. I request the court to enter my plea of ~~"GUILTY"~~ "Nolo Contendere" as set forth in paragraph 14.

Signed by me in the presence of my attorney this 11 day of Dec , 1984 .

	/s/ Jose Tamayo Reye
Address	Defendant

Translated from English to Spanish in presence of Jose Tamayo-Reyes 12/11/84

CERTIFICATE OF COUNSEL

The undersigned as lawyer and counsellor for the above defendant hereby certifies:

1. I have had read and fully explained to the defendant the allegations contained in the indictment in this case.

2. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

3. I have explained the maximum penalty for each count to the defendant, and consider him competent to understand the charges against him and the effect of his petition to enter a plea of guilty.

4. The plea of ~~"GUILTY"~~ "Nolo Contendere" offered by the defendant in paragraph 7 accords with my understanding of the facts he related to me and is consistent with my advice to the defendant.

5. In my opinion the plea of ~~"GUILTY"~~ "Nolo Contendere" is offered by the defendant in paragraph 7 of the petition is voluntarily and understandingly made. I recommend that the Court accept the plea of ~~"GUILTY"~~ "Nolo Contendere".

6. Having discussed this matter carefully with the defendant, I am satisfied, and I hereby certify, in my opinion, that he is mentally and physically competent; there is no mental or physical condition which would affect his understanding of these proceedings; further, I state that I have no reason to believe that he is presently operating under the influence of drugs or intoxicants. (Any exceptions to this should be stated by counsel on the record.)

Signed by me in the presence of the defendant above named and after full discussion of the contents of this certificate with the defendant, this 11 day of Dec, 1984.

[Signature and certification omitted in printing]

AMENDED PETITION
FOR POST-CONVICTION RELIEF

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JOSE TAMAYO REYES, Petitioner	)	No. 85-2612
vs.	)	
J.C. KEENEY, Superintendent, Oregon State Penitentiary, Defendant.	)	AMENDED PETITION FOR POST-CONVICTION RELIEF

Petitioner alleges:

1.

Petitioner is imprisoned in the Oregon State Penitentiary in Marion County, Oregon, and is unlawfully confined and restrained of his liberty by the above-named Defendant.

2.

Petitioner is imprisoned by virtue of a Judgment and sentence imposed by the Circuit Court for the State of Oregon for the County of Multnomah in the Case of *State of Oregon v. Jose Tamayo Reyes*, Case Number C84-09-33779. The Judgment purports to sentence Petitioner to a sentence of twenty (20) years.

3.

Petitioner did not appeal his case to the Oregon Court of Appeals and has not filed a prior Petition for Post-Conviction Relief. Petitioner has not filed any prior Post-Conviction proceedings.

4.

Petitioner is financially unable to retain counsel.

5.

Petitioner was originally charged with Murder in the First Degree. Petitioner was convicted of Manslaughter in the First Degree after a plea of guilty.

6.

Petitioner's trial attorney was Tommy Hawk.

7.

At all times mentioned herein, Petitioner was, and is, a lay-person and not learned in the law. At the above-mentioned proceedings, Petitioner relied upon the advice and representation of his attorneys in all matters pertaining to the law.

8.

Petitioner's imprisonment was, and is, illegal and the proceedings set forth above resulted in a substantial denial of Petitioner's rights in violation of ORS 138.530 as follows:

1. Petitioner did not knowingly or voluntarily enter a plea of guilty to the charge of Manslaughter in the First Degree, it being his understanding that the charge was being amended from Murder I to Manslaughter I and that he would then proceed to trial on the lesser charge.

2. Petitioner was denied effective or adequate assistance of counsel for the reason that Petitioner's attorney, Mr. Tommy Hawk, did not speak Spanish and Petitioner does not speak or understand English.

3. Petitioner was denied effective or adequate assistance of counsel for the reason that the interpreter, Mr. Ben Sanchez did not correctly, fully or accurately translate the communications between Petitioner and his attorney, which resulted in Petitioner's failing to understand that the charge was being reduced only because he was pleading guilty. Further, Petitioner did not understand that he was giving up

his rights to trial by jury to see, hear and confront the witnesses against him, to call witnesses and present evidence in his own behalf; and his right against self-incrimination.

WHEREFORE, Petitioner prays for an Order if this Court as follows:

1. Vacating the plea of guilty for the charge of Manslaughter I.

2. Remanding the case to the Circuit Court for Multnomah County for trial on the charge of Manslaughter I.

3. Other equitable relief.

[Signature omitted in printing]

DEPOSITION OF BEN SANCHEZ

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JOSE RAMAYO REYES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 85-1612 (*sic*)
	)	
J.C. KEENEY, Superintendent	)	
Oregon State Penitentiary,	)	
	)	
Defendant.	)	

DEPOSITION OF BEN SANCHEZ

Taken in perpetuation of testimony

in behalf of the Petitioner.

BE IT REMEMBERED That, pursuant to the stipulation of counsel for the respective parties hereinafter set forth, the deposition of BEN SANCHEZ, the witness herein, was taken in perpetuation of testimony before Leanne L. Pace, a Notary Public for Oregon, on Monday, September 22, 1986, beginning at the hour of 3:30 o'clock p.m., at the Department of Justice, Corrections Division, 240 Cottage Street, S.E., Salem, Oregon.

APPEARANCES:

RONALD M. HELLEWELL, of counsel, attorney for petitioner;

DEPARTMENT OF JUSTICE, by ROBERT J. JACKSON, of counsel, attorney for defendant.

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(At said time and place the following stipulation was entered into between the attorneys present in behalf of the respective parties:)

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the deposition of BEN SANCHEZ, the witness herein, may be taken in perpetuation of testimony before Leanne L. Pace, a Notary Public for Oregon, at this time and place, on oral interrogatories, direct and cross, to be propounded to said witness, as by law provided.

It is further stipulated and agreed that all irregularities as to notice of time and place and manner of taken said deposition are hereby waived.

It is further stipulated that the reading and signing of the said deposition by the witness are hereby waived.

[3]

BEN SANCHEZ, the witness herein, was thereupon produced as a witness to perpetuation of testimony and, having been first duly sworn by the Notary, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HELLEWELL:

Q Mr. Sanchez, please state your name for us, your full name.

A A. Ben Sanchez.

Q And were you involved as an interpreter in the case of State of Oregon versus Jose Tamayo Reyes?

A Yes.

Q And just for clarification that was on a charge of murder, is that correct?

A That is correct.
Q Also just for clarification first, you are now a member of the Oregon State Bar, is that correct?
A Yes.
Q And during the time of the court appearances in this case, the last few months of 1984 and the first month I believe in 1985, you were also then a member of the Oregon State Bar?
A That is correct.
Q And also for purposes of clarification, you did represent

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the same man as the attorney in other cases, is that correct?
A Yes.
Q Was that just one case?
A No. I believe there was a felony and a misdemeanor.
Q And during what period of time was that?
A Maybe — the cases, if I remember correctly, the cases were resolved after this one we resolved.
Q Okay. And did they begin before this case began?
A I couldn't tell you without looking at my records.
Q Again, just for purposes of identification, the murder case was Multnomah County case number 84-09-33779.
A The numbers I don't remember.
Q Okay.
A Being interpreter, I didn't pay attention to numbers. Just pay attention to — Mr. Tommy Hawk was the attorney of record.
Q Right. Tell us, how did you get involved in the case as an interpreter? Who called upon you?

A Both the Judge — Judge Bergman, I believe she was the appointed attorney — I mean, the appointed Judge. And Mr. Hawk, Mr. Tommy Hawk.
Q Were you paid through the court, or through the attorney?
A Through the court.
Q Speaking just for the murder case now, when did you begin

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your involvement in the case?
A I believe it was right at the beginning.
Q Does Mr. Tommy Hawk speak any Spanish?
A (Witness shakes head in the negative)
MR. JACKSON: You have to answer out loud.
(The witness continuing) No.
Q Thank you. Did you go with him on every occasion when he went to visit the defendant, Mr. Reyes?
A As far as I know I did.
Q Do you recall how many times the two of you did visit him?
A I would have to look at my notes. Offhand I don't know.
Q Did you visit Mr. Reyes on your own without Mr. Tommy Hawk being there?
A Not in regard with the murder case. I may have once. I may have once. Just to go see him to tell him so on and so forth. But I would have to look at my records.
Q Did you talk with Mr. Reyes about his background, education and so on?
A No.
Q Do you know where he is from?
A I know he's from Cuba.
Q Do you know how he arrived in the United States? Did he tell you?
A He's supposed to be one of the boat people.

Q Does Mariel (phonetic spelling) ring a bell?

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A Martoletos (phonetic spelling).

Q Martoletos. And I understand that that's his situation, is that correct?

A That's the way I understood it, yes.

Q What is your background and education?

A I went to University, I went to Junior College. Came up to Willamette. And then from Willamette Law I went to Willamette Law School for two years, Northwest two years.

Q And what has been your experience as an interpreter in court?

A Most of the time I usually have an interpreter. I mean, in Portland I get appointed to many Spanish cases simply because there's nobody else that can speak Spanish fluently. So, I get a lot of those cases. That's how I came into the Reyes to begin with. And then when this — so, if I have a trial, I don't — I don't do my own translating. I have somebody else do it.

Q Of course not. So, as an interpreter for somebody else, can you explain what your experience is? How many times?

A I don't have very many times. I've had this one. And, um — the courts have called upon me a couple of times for other — when somebody else is not available and they have to have somebody real quickly.

Q Okay. What's been your training or education in the Spanish language?

[7]

A That was my first language.

Q That was the language spoken at home?

A Yes.

Q Have you taken any Spanish courses, even advanced courses like literature or grammar, or anything in college?

A I had two years here in Willamette.

Q I believe the record will reflect that there was a change of plea in this case on December 11, 1984. Perhaps you don't recall the date. But do you remember the circumstances of that change of plea?

A I remember there was a change of plea from not guilty to guilty to the lesser included charge, if I remember correctly.

Q And you're present in court?

A Yes.

Q There was an exchange of information between the District Attorney and the attorney representing Mr. Reyes. And you were present during that exchange?

A To the best of my recollection I was there most of the time.

Q And while the others were speaking, did you translate the proceedings for the defendant, Mr. Reyes?

A Yes.

Q Prior to entering court on that day, did you assist Mr. Hawk in completing a plea petition?

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A Yes.

Q Also a waiver of jury form?

A Yes.

Q What were the circumstances of those, completing those papers, do you remember when and where?

A They were in the courtroom. I believe we read them out to the individual, to Mr. Reyes. Told him what they were. More than once. Maybe two or three times to make sure he understood. And he indicated he understood.

Q Was that on the date of the appearance for the change of plea in the courtroom?
A I think it was. I would have to look in my notes again.
Q Were you also present when, I guess the answer is obvious, when Mr. Hawk discussed the plea negotiations with Mr. Reyes?
A Yes.
Q Then you translated all that proceeding for them?
A That is correct.
Q Did you explain to Mr. Reyes the difference between a plea of guilty and a plea of no contest?
A I believe we did. No, I can't specifically tell you whether I did or not.
Q Do you recall if it was actually a no contest plea or a plea of guilty?
A I cannot tell you without looking at my records.

[9]

Q Do you recall on the date that you appeared in court the Judge addressing the defendant, Mr. Reyes —
A (interposing) Yes.
Q (Mr. Hellewell continuing) Personally. And do you recall the Judge asking him through you if he understood his rights in the matter?
A Yes.
Q Do you recall his answer when the Judge asked him that question?
A If I remember correctly he said, yes, he indicated that he understood.
Q Do you recall the Judge asking him a question about if he wished to plead — plead no contest to the charge rather than of a trial, do you remember that specific question?

A No.
Q During the change of plea proceeding was there a time when you went off the record for a conversation?
A I believe there was.
Q Was that conversation between you and Mr. Hawk and Mr. Reyes, the defendant?
A They were discussing — I was just the interpreter. I had nothing do so with the legal — I was interpreter, that was it.
Q Okay. Do you recall what the — what they discussed off

[10]

the record?
A Well, I believe probably they were discussing the ramifications of making a plea. Taking a lesser charge. Or if they went to trial what the possibility could be.
Q Okay. You suppose that's what it was about. But you don't recall at this moment?
A It's been two years ago.
Q Right. How long was that discussion off the record?
A I think it was various times when they discussed it back and forth.
Q Okay. Do you recall responding to the Judge, after this conversation off the record, "Mr. Reyes says okay," do you recall that?
A Probably.
Q Were you discussing at that time the problem about the immigration?
A There was some — some discussion as to the possibility, ramification of making a plea, and what could happen to him since he was — he was — didn't have papers.
Q And was that discussion in the courtroom that day, or on prior occasions?

A We discussed — we spoke together back and forth quite a number of times. I can't specifically tell you what we said that particular day.

Q Do you recall from this experience specifically some words

[11]

that were used? What word do you use, or what words did you use in this case to communicate to him the term murder?

A Murder — (in Spanish) — that he had killed somebody without the right to do so.

(WHEREUPON, an off the record discussion was had.)

Q And what word did you use for manslaughter?

MR. JACKSON: Maybe we ought to stop for a minute here and think how we're going to do this. We're going to have to spell out on the record what those words are and get them down phonetically or something, because there's now a blank in our record from the last part that he put in there. So, maybe we ought to see if we can't at least phonetically put down what he said for murder.

(WHEREUPON, an off the record discussion was had.)

(Mr. Hellewell continuing) Tell us again what word or phrase you used to communicate murder.

A One of the words is — (in Spanish) — killer.

Q That's M A T A —

A T A D O R (spelling).

Q Okay.

A The other word would be — (in Spanish).

MR. JACKSON: Q U E U S T E D (spelling)

(The witness continuing) (In Spanish)

Q M A T O (spelling). **[12]**

A Una persona

Q U N A is Una.

A Persona. Person with an A.

Q P E R S O N A (spelling).

A (In Spanish) — P E R M Y S S O (spelling). (In Spanish — D E R C H E O (spelling). (In Spanish) — P A R A M A T A (spelling). Una persona.

Q All right. Now, manslaughter.

A (In Spanish) — that it was less than murder.

Q Era is E R A (spelling) and menos is M E N O S (spelling).

A (Witness nods head in the affirmative)

Q Okay. How did you tell him knowing or knowingly?

A (In Spanish)

Q Can you —

A That he — (in Spanish).

Q E L (spelling)

A Savia.

Q S A V I A (spelling).

A Lo.

Q L O (spelling)

A (In Spanish)

Q Q U E —

A (In Spanish)

Q E S T A V A (spelling).

A (In Spanish)

[13]

Q E S A N D O (spelling). Okay?

A Um hum.

Q Indifferent or indifference?

A No, I can't even know how I would have described that.

Q How about — let's see, when did — okay. During discussions with the attorney in regard to the plea negotiations, did you discuss these terms with him that we just talked about?
A Yes.
Q And did he — did he indicate that he understood what —
A (interposing) Yes.
Q (Mr. Hellewell continuing) The terms you were using. Okay. Did Mr. Reyes at any time read any documents in Spanish for you?
A I believe he read — I'm not positive, but I believe that he — in Multnomah County they have the forms in English and Spanish.
Q Did you —
A (interposing) The petition to enter a plea of guilty had been translated into Spanish.
Q Do you recall if he actually had any of those forms in Spanish and read them?
A No, I can't remember.
Q Did he communicate at all in English?
A No. Oh, well, a little bit. Broken English. There's so

[14]

many times in my experience has been that they can understand. But they're embarrassed because of the brokenness in the language, in the actual speaking of it that they rather not speak it. Although they may understand.

Q Okay. Now, I understand that you yourself don't often read Spanish, is that correct?
A Very little, unless I absolutely have to. And it has to be very slow.

Q So, the forms that you went over with him were printed in English?
A More likely than not, yes.
Q And you read them to him in Spanish?
A I translated it to him.
Q Did you — did you explain to him in either the process of the preparing the change of plea petition, or in open court that there would be no trial in the case?
A Very definitely.
Q Did he ask you about witnesses appearing for him?
A Yes.
Q Did he want to know if witnesses would be there?
A Yes.
Q And did you tell him that they would not?
A I told him that they would not unless there' [*sic*] a trial.
Q After the sentencing was imposed, did you go over with

[15]

him his — what had been said at sentencing, what it meant to him?

A Yes.
Q Did you discuss with him his right to appeal?
A Yes.
Q At the time of sentencing did he make any statement himself, that you can recall?
A I can't remember.
Q That you were present when the attorneys and Judge were speaking?
A Yes, I was there.
Q And you translated all those proceedings to him?
A Yes.

Q Prior to sentencing did you review with him the presentence investigation report?
A Yes.
Q Again with Mr. Hawk?
A Yes.
Q Did he have any questions about the process of preparing a presentence report, and then appearing for sentencing?
A Well, Mr. Hawk, I believe, if I remember correctly, explained to him what a police interview report was.
Q And did Mr. Reyes have any question?
A No. Didn't indicate that.
Q Do you recall specifically discussing with Mr. Reyes,

[16]

prior to the change of plea, the recommendations by the District Attorney?
A Yes.
Q Do you recall what that recommendation was?
A (Witness shakes head in the negative)
Q Is it your practice, when appearing in court as an interpreter, to interpret every word that is spoken in a whisper to the defendant, even though no one is addressing him directly?
A I just normally — they put me between — they put the defendant between the attorney and the interpreter. And he just — I would just tell him what's happening.
Q Okay. And is that what you did in this case?
A More likely than not. I couldn't tell you —
Q Do you recall how many court appearances there were in this case?
A No. There were quite a number of them.

MR. HELLEWELL: Thank you. That is all the questions I have.

CROSS EXAMINATION

BY MR. JACKSON:

Q I have just got a couple. First I would like to have you take a look at this document. And I would like to have it marked as a deposition exhibit.

[17]

(WHEREUPON, Defendant Deposition Exhibit No. 1 was marked for identification.)

A That appears to be the instrument — that appears to be the instrument — that appears to be the instrument that was presented to Mr. Toma (sic).
Q That's the plea agreement?
A Yes. I believe it —
Q Petition to enter a plea of guilty?
A Yes.

MR. JACKSON: Show you that and enter that.

Q Who filled out that document?
A I believe it was Tommy Hawk.
Q On the second page there there's some writing. It says translated from English to Spanish in person on Jose Tamayo Reyes. And then it has a signature. Is that your signature?
A Yes, it is.
Q And you signed at that time that you had in fact translated this entire document from English into Spanish and went over it with him?
A Yeah.
Q Is there any doubt in your mind that he understood what you were telling him in regards to these items?
A No.

[18]

Q Okay. When you appeared in court — when you appeared in court for the change of plea hearing, did you take an oath as an interpreter?

A Yes.

Q And did you translate the proceeding from Spanish — from English to Spanish, and from Spanish to English, verbatim as they were said in English —

A (interposing) Yes.

Q (Mr. Jackson continuing) Or in Spanish. Did you have any difficulty communicating with Mr. Reyes in Spanish?

A No.

Q Was his dialect of Spanish similar to the one that you spoke as a —

A (interposing) There's a slight difference. Cuban — Carribean [*sic*] countries for some reason or other will usually drop the last syllable, or part of the last syllable. Miss half pronounce the last syllable. For example you say o'clock. It would be o'clock.

Q That didn't cause you any great amount of difficulty, did it?

A No. Because it's closer to Castillian [*sic*].

Q When Mr. Hellewell first began questioning you on this deposition he referred to something called Maraletos, or something close to that. And apparently you and he know what that is, but I don't. Could you enlighten me,

[19]

please?

A That's what the people — boat people were called.

Q Okay.

A Where the name came from, I don't know. Just that's what they referred to.

MR. JACKSON: I have no further questions.

REDIRECT EXAMINATION

BY MR. HELLEWELL:

Q I'm sorry, I'm sure you answered this question before. Whose writing is that on the petition?

A I believe it's Tommy Hawk's. It's not mine. You can tell in between his writing and my signature. My chicken scratch.

Q And did Mr. Reyes sign this himself?

A Yes.

MR. HELLEWELL: Thank you. I have nothing further.

(CONCLUSION)

TRANSCRIPT OF PROCEEDINGS

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

JOSE RAMAYO REYES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 85-2612
	)	
J.C. KEENEY, Superintendent	)	
Oregon State Penitentiary,	)	
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS:

BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Richard D. Barber, on the 6th day of January, 1987, at 2 p.m., at the Marion County Courthouse, Salem, Oregon.

APPEARANCES:

Ronald M. Hellewell, Attorney at Law, representing the Petitioner;

Robert J. Jackson, Assistant Attorney General for the State of Oregon, representing the Defendant;

Terry Prieto, Spanish interpreter.

[Index omitted in printing]

[2]

(Whereupon, the following proceedings were had, to wit:)

MR. JACKSON: Your Honor, the next case is the case of Jose Tamayo Reyes versus J.C. Keeney, Marion case number 85-2612. Mr. Reyes appears in court in custody with his attorney Ron Hellewell. I'll be representing the Defendant.

THE COURT: Will this lady be serving as an interpreter?

MR. HELLEWELL: We're assisted by Mrs. Terry Prieto, P-r-i-e-t-o.

THE COURT: Will the interpreter please rise and be sworn.

TERRY PRIETO,

was sworn as the Spanish interpreter.

THE COURT: Mr. Hellewell, did you have an opening statement?

MR. HELLEWELL: Yes, Your Honor. Your Honor, the issue in this case is the interpreter. Mr. Reyes was charged with the crime of murder. He was represented by an attorney, and the attorney was assisted by an interpreter. The attorney was Mr. Haw, [*sic*] the interpreter was Mr. Ben Sanchez. Through several court appearances and several negotiations it resulted in Mr. Reyes pleading guilty to the charge of

[3]

Manslaughter.

The case was continued for preparation of the presentence investigation report and returned for sentencing. The problem is that the interpreter, Mr. Sanchez, I think, can best be described as somewhat loose or colloquial or paraphrasing in his interpreting to Mr. Reyes. We have information to present to the Court on those matters. It resulted in the fact that Mr. Reyes was confused and did not understand that the proceedings against him were of the nature that they were, that is, a plea to a lesser-

included offense; in exchange for and that there would be no trial.

Specifically Mr. Reyes mentioned on several occasions to his attorney, to the interpreter, that he wishes witnesses to appear on his behalf. Now, we know that that process is a trial or perhaps in a very limited sense a mitigation hearing at the time of sentencing. Mr. Reyes could not articulate and so precise terminology what exactly was being done there, but he made it clear he wanted his witnesses.

He did admit from the beginning that there was a death and that he was involved at the time, but he wishes his witnesses to appear and explain to the Court the circumstances. It was — The event itself was a tavern fight, and things were quite confused, and Mr. Reyes was not certain himself of the exact sequence of events or his role in them. That's why he wanted these witnesses to appear.

[4]

We would be presenting evidence to the Court of the role of Mr. Sanchez, the interpreter, and Mr. Reyes perception of what happened.

THE COURT: Mr. Jackson.

MR. JACKSON: I'll waive opening, Your Honor.

THE COURT: All right. You may call you witness.

MR. HELLEWELL: Before we begin that, Your Honor, I would like, if I may, to hand up to the Court the documents referred to, if we could do them perhaps all at once to make matters easier. First is the transcript of proceedings December 11, 1984 in the trial court in which the plea of guilty was entered. The second is a transcript of proceedings January 22, 1985 in which sentencing was pronounced. Third is the deposition of Ben Sanchez taken September 26, '86.

MR. JACKSON: I have no objection to any of those, Your Honor.

THE COURT: All right. Exhibits 1 through 4 are received.

MR. HELLEWELL: We'd be referring to those later, but now we'd like to call Mr. Reyes as a witness.

THE COURT: There are only three exhibits, aren't there? Exhibits 1 through 3 are received.

All right. I have some instructions for the interpreter now. When a question is asked, it will be asked by Mr.

[5]

Hellewell through you. You will translate that to the witness. He will give you his answer in Spanish. You will translate it and give it back to the Court.

THE INTERPRETER: Yes, sir.

THE COURT: And so use the first person; don't use, he says this or he says that. Do you understand?

THE INTERPRETER: Yes, Your Honor.

THE COURT: All right. Stand and be sworn please. Stand with him and translate for him.

[6]

JOSE TAMAYO REYES,

called as a witness on his own behalf as Petitioner, being first duly sworn, was examined and testified through the Spanish interpreter as follows:

THE CLERK: Please state your full name and spell your first and last name.

THE WITNESS: Jose Tamayo Reyes.

THE COURT: R-e-y-e-s?

THE WITNESS: R-e-y-e-s.

THE COURT: All right. Go ahead.

DIRECT EXAMINATION

BY MR. HELLEWELL:

Q Mr. Reyes, how old are you?

A 39.

Q Where were you born?

A In the field near Bayamo.

Q What country?

A Cuba.

Q And I think you were trying to describe maybe the name of the town. What is the town that was closest?

A Bayamo.

Q Thank you. Did you attend school?

A No.

[7]

Q Have you learned on your own to read and write in Spanish?

A I learned a little bit reading books.

Q You now are in custody at the Oregon State Penitentiary, right?

A Yes.

Q Do you now understand English?

A Some words.

Q Have you been studying English while in the penitentiary?

A Yes.

Q In 1984 you were charged with murder? Do you remember that?

A Yes.

Q And you were assisted by an attorney. Do you remember him?

A Yes.

Q And you were also assisted by an interpreter?

A Yes.

Q Did you make several appearances in court?

A Yes, and I went a few times, but I didn't understood the interpreter when he was explaining me what was happening.

Q Why did you not understand what the interpreter said to you?

A I don't know, because he didn't explain it to me.

[8]

They were discussing and talking. He didn't say to me what was happening.

Q Do you remember at least one occasion in which several people came to court on your behalf?

A It was only one witness, and there needed to be another one in there, and then the lawyer wanted to know what he was there. It was one of the witnesses that he talk, and then the other lawyer said why he was talking in my favor.

Q Do you remember a hearing on the issue of bail, that is, being released from custody on the payment of some sum of money?

A No, then he — They never explained that to me.

Q Where there other witnesses who you wanted to come to court?

A The girl who was the problem.

MR. HELLEWELL: (To the interpreter) Please stop.

A It was the girl who was the problem. And then there was another Chicano man, which is an American-Mexican, but when the investigator was going to the bar and asking for him, everybody said that he was not there, and the girl was there too.

Q Were there other witnesses too besides those that you've mentioned?

A The one that come over here, Pedro Rodriquez.

[9]

Q Do you recall signing a piece of paper when you were in court?

A When I was sitting in the courtroom Mr. Sanchez asked me to sign a piece of paper, and I asked him what should I sign it; I don't even know what it says. He said, "Just sign it."

Q Did Mr. Sanchez read it to you?

A No. He didn't read to me; he just said to sign it. And I just ask him, I just wanted to go trial with everybody, all the witnesses and everybody.

Q Did you sign the paper?

A And I signed the paper because he told me there was going to have a court with all the people.

Q Did you do any writing on the paper besides the place where you wrote your name?

A No, just my name Jose Tamayo.

Q Did Mr. Sanchez do some writing on that paper in front of you?

A I don't remember.

Q Did your attorney, Mr. Hawk, do any writing on that paper in front of you?

A I think he did.

Q Why did you want the witnesses to come to court?

A Because they were saying the truth and how the case happened.

Q When did you find out that the witnesses would not be

[10]

coming?

A It was while I was at county, and I asked Mr. Sanchez to look for them and —

Q But when did you find out that they were not going to come, that you would not have a chance to talk to them in court?

MR. HELLEWELL: (To the interpreter) Please wait.

A That was in the last court they appear and they just stopped me and they say, well, you got 20 years and 8 years, and I asked Mr. Sanchez what happened.

Q Did you speak to the judge?

A No, I didn't talk to the judge. The only thing I say I heard is after the finish I stand up and they told me they have 28 years — 20 and 8 years, And then I asked Mr. Sanchez, well, what happens, Sanchez? Where the people? Where is the witnesses? And he said, "No, the court is over. That's it."

MR. HELLEWELL: Thank you. No further questions.

MR. JACKSON: I don't have any questions of this witness, Your Honor.

THE COURT: You may step down.

MR. HELLEWELL: We have no further witnesses, just argument.

[11]

THE COURT: Mr. Jackson.

MR. JACKSON: Yes, Your Honor. I would like to point out to the Court that in the back of the deposition of Ben Sanchez there is a copy of the Plea Petition that was filed in this case. I have an Exhibit 101, Your Honor, which is an affidavit of Tommy Hawk. I believe I've supplied you with a copy of that previously.

THE COURT: There's one in the file. Is that the same one? Also one of Mr. Sanchez.

MR. JACKSON: Could be. Those might have been filed. That was at the time my Secretary was sending them to the Court.

THE COURT: Do you want Mr. Sanchez's in also?

MR. JACKSON: Yes, sir. I would like to have that in there also. We'll make that Exhibit 102, if we could.

THE COURT: All right. Exhibits 101 and 102 are received, unless you have any objection.

MR. HELLEWELL: No objection.

MR. JACKSON: Your Honor, with that the Defendant would rest. I do have some argument and response to Mr. Hellewell's comments.

THE COURT: All right, Mr. Hellewell.

MR. HELLEWELL: Your Honor, I'd like to point out some specific items in these transcripts and depositions. First, let's begin with the transcript of the deposition of Ben

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Sanchez, page 6, beginning with line 18 and running through the next couple of lines, i.e., the questions being propounded in this section were by me, and the answers by Mr. Sanchez.

I asked him about his courtroom experience in interpreting. His answer beginning on line 20 was that he had not done it very many times as an interpreter. He worked — In the preceding lines he explained that he had worked as an attorney for Spanish-speaking people but not as an interpreter.

Moving in the same deposition to page 14, beginning at line 6, question and answer there concerning his ability to read Spanish, his answer, "Very little, unless I absolutely have to, and it has to be very slow."

We'll have another comment or further qualifications. I think his experience in Spanish as shown in other parts of this deposition were that he has conversation but not schooled in the language.

Also in the deposition of Mr. Sanchez on page 11 and 12 there was an exchange there between himself and me concerning vocabulary for these terms. The two most important terms under consideration while this case was being considered at the trial level were murder and manslaughter. Those terms are quite difficult to understand to someone not schooled in the law and having a precise legal definition. Furthermore, they are not capable of interpretation in the Spanish language by any single word because they —

[13]

MR. JACKSON: Your Honor, I'm going to have to object to this unless Mr. Hellewell's putting himself forth as an expert witness. He's trying to provide this Court with testimony in regard to the application of the Spanish language, and I don't think that's proper.

THE COURT: The Court is aware of Mr. Hellewell's ability to communicate in the Spanish language.

MR. JACKSON: However, Your Honor, we could bring in I don't know how many experts that we can bring in, if he wants to present himself as a witness to talk about what the terms mean that are put down here. He's contesting this witness's ability to interpret by his own interpretations, and unless he's going to go on the record as a witness to do that, which he's already rested, then that's fine, but he can't sit here and say what the meaning of Spanish words are that Mr. Sanchez has translated in his deposition.

THE COURT: Does this appear in the evidence anywhere?

MR. HELLEWELL: Yes, Your Honor. I can solve this problem by relying strictly on the words printed here in the transcript beginning at line 3 on page 11. Mr. Sanchez replied,

"Murder, that he had killed somebody without the right to do so." I'd like the Court to be aware that that is a fairly complete description of the term as we use it in our statutes. Then moving down to the

[14]

foot of that page, Mr. Sanchez did explain those same words in Spanish spelling the words for the reporter.

Moving to page 13, beginning at line 8, I asked him to describe his word for manslaughter. He responded on line 9 in Spanish that then he himself translated to English "that it was less than murder."

I submit to the Court that that is a very brief, very incomplete description of the term for manslaughter.

Following on that page is his spelling for the reporter in Spanish of the words used, but his interpretation is there on page 9, that it was less than a murder.

THE COURT: But you just referred to page 13, and I think you were actually on page 12.

MR. HELLEWELL: Oh, yes. I beg your pardon. Page 12.

Finally, one more item that I'd like to bring to the Court's attention in this deposition on page 14 beginning at line 19, again, the issue concerning the witnesses.

MR. JACKSON: What page is that please?

MR. HELLEWELL: Page 14, beginning with the question on page 19, the question about the witnesses appearing for the Defendant, "Did he ask you about witnesses appearing for him?" Answer, "Yes."

"Did he want to know if witnesses would be there" Answer, "Yes." Then I would point out to make the

[15]

record complete, "And did you tell him that they would not? I told him they would not unless there a trial." I think a word perhaps is omitted there. Again, just pointing out for the Court that there was this concern on the part of the Defendant at the trial, Mr. Reyes, concerning the witnesses.

Finally, the exhibit which is attached to this transcript is the Plea Petition. The very final page under paragraph 14, the Plea Petition form apparently used in Multnomah County requests something of the facts to support the plea. The handwriting there Mr. Reyes has testified is not his; however, he discussed the matter with Mr. Sanchez, and so apparently for our purposes we can assume that these are his words. I believe it says, this script is somewhat difficult to read, "I request court to consider testimony of witnesses who testified during my bail hearing as factual basis for my plea," again, another indication on the part of Mr. Reyes that whatever the meaning of this process was, that there still would be witnesses.

Returning now to the earliest of these documents, which is the transcript of proceedings of December 11 '84, in this proceeding the court did inquire of Mr. Sanchez concerning his qualifications. At the bottom of page 2 the court inquired if Mr. Sanchez was a member of the State bar, and the last line on that page by the court, "And you speak, read and write Spanish fluently?" On page 3 the interpreter

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responded, "I do not write or read Spanish. I only speak it."

Just for the Court's clarification, on line 4, the question by the court, "Did you read this Plea Petition to Mr. Reyes in

Spanish?" Then he answered, "Yes." I think that meant to say, did you read him the Plea Petition and translate it as you want, the Plea Petition, of course, being written in English.

Further, in this same proceeding on page 4, the court, beginning on line 5, began to inform the defendant of his rights. He went through two paragraphs on that page informing him of his rights to trial, testimony, assistance of counsel, and so on. The final line on that in that section the court asked the Defendant if he understood, line 23, the witness responded, "More or less."

Continuing on page 5, the court repeated the questions in order to get a clear understanding. The Defendant responded — well, the interpreter responded apparently on behalf of the Defendant, "He doesn't know anything about such things." The court persisted, asked the question again. The interpreter responded, "He says, 'I don't comprehend.'" The court still persisted asking the question again, at which point a discussion was held off the record. We don't know the substance of that discussion, but the interpreter returned and said, "He says, okay."

I would submit to the Court that there was not a

[17]

clear and precise explanation to him of his rights to trial and that he was waiving those rights.

Your Honor, the problem is here that Mr. Reyes is not well-schooled. He was certainly not aware of the proceedings of legal nature against him. He had to rely solely upon the words spoken to him by the interpreter. Mr. Sanchez may have a colloquial understanding of the language, as explained in his deposition, that he has spoken of as his native language, but is not schooled in it. His definitions of the most important words,

murder and manslaughter, were not precise, and throughout the proceeding Mr. Reyes made it clear that he wanted people to come and talk on his behalf.

Now, we know that's a trial, and Mr. Reyes may not be able to articulate that as a legal principal [*sic*], but that's the right that he wished to preserve, and he did not by this proceeding.

MR. JACKSON: Your Honor, very briefly, the testimony of Mr. Hawk and Mr. Sanchez through their affidavits and depositions show clearly that at the time anyway Mr. Reyes knew just exactly what was going on and understood the proceedings. In the process of interpreting, maybe they are not exact, but I would point out to the Court there's been much made of the fact that Mr. Sanchez does not read or write Spanish. There is not one item involved in this case that was written in Spanish for him to read or that required him to

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write out anything in Spanish. What is required him to do was to translate the English language in this Petition into Spanish.

I submit to the Court that Mr. Sanchez is a highly educated individual with a law degree as well as a college degree, and his native language is Spanish. I submit to the Court that I have had several years of Spanish myself. I can maybe read and write Spanish better than Mr. Sanchez can, but I'd rather have him interpreting for me because that's what was necessary in this case was to be able to speak it and understand it.

The facts for the factual basis for the plea were referring to a bail hearing that was held, and that's the time that these witnesses were apparently put on for the purposes of making

sure that Mr. Reyes was not given bail at that time, and they chose to use that testimony as the factual basis for the plan. There is certainly nothing wrong with that, and there's nothing that indicates he expected any witnesses to appear at a trial from what he was pleading guilty to just because there was witnesses at the bail hearing.

He said that Mr. Sanchez may have a colloquial understanding of Spanish but couldn't read or write it and didn't have any schooling in it. The fact is it's been presented by Mr. Hellewell through his witnesses that the Petitioner in this case doesn't have any schooling in Spanish

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either and that his only understanding of Spanish is colloquial understanding of it. And that would be a far better match, I would contend, than a school-trained, Castilian Spanish-speaking person to a uneducated person of Spanish decent that has not ever had any formal training in Spanish.

Your Honor, this case is very simple. The depositions and the evidence that has been presented show that this plea was knowingly and voluntarily entered. We'd ask the Court to deny the Petition's Petition for Post-Conviction Relief.

THE COURT: Any response?

MR. HELLEWELL: Just one brief response. This Plea Petition talking about the witnesses, I think it was merely a shorthand way of describing who those people were; I want the people to come who came at the bail hearing. I don't think that there was any indication at that point that the bail hearing should be carried over to the entry of the pleas. And secondly, I'm not relying that much on ability to read and write; I'm relying on the ability as manifested especially by the deposition of Mr. Sanchez

himself to adequately communicate in language precise enough of the precise legal terms involved.

THE COURT: All right. The case is under advisement.

* * * *

[Certification and signatures omitted in printing]

POST-CONVICTION COURT'S FINDINGS

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION
No. 85-2612

JOSE TAMAYO REYES,)
Petitioner,)
v.)
J.C. KEENEY, Superintendent,)
Oregon State Penitentiary,)
Defendant.)

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND JUDGMENT

This matter came before the court and the Honorable Richard D. Barber for trial on petitioner's Petition for Post-Conviction Relief. Petitioner appeared in person and by his attorney, Ronald M. Hellewell, and defendant appeared by and through his attorney, Robert J. Jackson, Assistant Attorney General.

In this proceeding, petitioner contends that his conviction is void and the subsequent sentence invalid in that the conviction was obtained in violation of his constitutional rights.

Specifically, petitioner claims that:

1. Petitioner did not knowingly or voluntarily enter a plea of guilty to the charge of Manslaughter in the First Degree, it being his understanding that the charge was being amended from Murder I to Manslaughter I and that he would then proceed to trial on the lesser charge.

2. Petitioner was denied effective or adequate assistance of counsel for the reason that Petitioner's attorney, Mr. Tommy

Hawk, did not speak Spanish and Petitioner does not speak or understand English.

3. Petitioner was denied effective or adequate assistance of counsel for the reason that the interpreter, Mr. Ben Sanchez, did not correctly, fully or accurately translate the communications between Petitioner and his attorney, which resulted in Petitioner's failing to understand that the charge was being reduced only because he was pleading guilty. Further, Petitioner did not understand that he was giving up his rights to trial by jury to see, hear and confront the witnesses against him, to call witnesses and present evidence in his own behalf; and his right against self-incrimination.

FINDINGS OF FACT

1. Petitioner's plea of guilty was knowingly and voluntarily entered.

2. Petitioner was properly served by an interpreter in the proceedings leading to his conviction.

3. The interpreter correctly, fully and accurately translated the communications between Petitioner and his attorney.

4. Petitioner has not sustained his burden of proof in regard to any of the allegations in his petition.

5. Representation by counsel was reasonable and effective under the circumstances.

CONCLUSIONS OF LAW

1. Petitioner was not denied his right to effective assistance of counsel.

2. Petitioner is not entitled to post-conviction relief.

Based on the foregoing Findings of Fact and Conclusions of Law, the court makes the following:

JUDGMENT

NOW, THEREFORE, IT IS ORDERED that petitioner's Petition for Post-Conviction Relief is denied and dismissed with petitioner obtaining no relief thereunder.

DATED at Salem, Oregon, this 22 day of March, 1987.

[Signature omitted in printing]

HABEAS PETITION

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

AO 241 (REV. 5/85)

UNITED STATES DISTRICT COURT	District OF OREGON	
Name JOSE TAMAYO REYES	Prisoner No. #48162	Case No.
Place of Confinement: OREGON STATE PENITENTIARY		
Name of Petitioner		
The Attorney General of the State of: DAVE FROHNMAYER		

PETITION

1. Name and location of court which entered the judgment of conviction under attack MULTNOMAH COUNTY CIRCUIT COURT, Portland, Oregon 97204
2. Date of judgment of conviction JANUARY 22-1985 at 9:15 a.m. Time of Sentencing.
3. Length of sentence TWENTY YEARS with EIGHT YEARS MINIMUM Sentence
4. Nature of offense involved (all counts) Mr. REYES WAS CONVICTED OF MANSLAUGHTER.
5. What was your plea? (Check one)
   (a) Not guilty ☐
   (b) Guilty ☐
   (c) Nolo contendere ☑
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another county or indictment, give details: N/A

6. If you pleaded not guilty, what kind of trial did you have? (Check one) N/A

(a) Jury ☐

(b) Judge only ☐

7. Did you testify at the trial? N/A

Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?

Yes ☐ No ☑

9. If you did appeal, answer the following:

(a) Name of court N/A

(b) Result

(c) Date of result and citation, if known N/A

(d) Grounds raised N/A

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court N/A

(2) Result N/A

(3) Date of result and citation, if known N/A

(4) Grounds raised N/A

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court N/A

(2) Result N/A

(3) Date of result and citation, if known N/A

(4) Grounds raised N/A

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☑ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court MARION COUNTY CIRCUIT COURT

(2) Nature of proceeding POST CONVICTION RELIEF ORS 138.510.

(3) Grounds raised PLEA OF NO CONTEST WAS NOT ENTERED KNOWINGLY, VOLUNTARILY AND COMPETENTLY; INEFFECTIVE ASSISTANCE OF COUNSEL due to fact that Trial Counsel did not speak, read, or write spanish and as result petitioner did not understand the proceedings or that he was pleading no-contest; see attached page "4-A" citing other grounds raised:

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☒

(5) Result POST CONVICTION RELIEF DENIED

(6) Date of result 23rd. March -1987

(b) As to any second petition, application or motion give the same information:

(1) Name of court NON-APPLICABLE.

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☑ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

→ (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

→ (j) Denial of right of appeal.

A. Ground one: (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and

(SUPPLEMENTAL PAGE)

PAGE "4-A", Continuance of Page 4 specifically setion [*sic*] "11." subsection (3) " GROUNDS RAISED :

(3" continued: Ineffective assistance of Counsel due to fact that interpretator [*sic*] did not accurately translate Trial Counsels advice to defendant and as a result petitioner did not understand the proceedings. END.

consequences of the plea

Supporting FACTS (state *briefly* without citing cases or law) Petitioner did not knowingly or voluntarily enter a plea of guilty to the charge of manslaughter in the first degree, it being his understanding that the charge was being amended from Murder I to Manslaughter I and that he would then proceed to trial on the lesser charge.End.//////////////////////////

B. Ground two: Petitioner was denied effective or adequate assistance of counsel for the reason that Petitioner's Attorney, Mr. TOMMY HAWK, did not speak spanish and Petitioner does not speak/understand english.

Supporting FACTS (state *briefly* without citing cases or law): Petitioner since the date of arrest has had difficulty understanding his Attorney's advice as well as all other relevant information that his attorney has attempted to relay to petitioner, this is due to the language problem as a result petitioner nerver [*sic*] understood the proceedings or the nature of the crime to which he plead no contest.End.//

C. Ground three: Petitioner was denied effective or adequate assistance of counsel for the reason that the interpreter ,Mr. Ben Sanchez did not correctly translate the communications of Defense Counsel.

Supporting FACTS (state *briefly* without citing cases or law): Petitioner was denied effective assistence [*sic*] of Counsel due to the fact that the interpretator [*sic*] did not accurately translate the communications of his defence [*sic*] counsel which resulted in petitioner's failing to understand that the charge was being reduced only because he was pleading guilty. Further, petitioner did not understand

that he was giving up his rights to trial by jury,on confrontation, self-incrimination, plus the right to present his own witnesses and defence.[*sic*]End. //////////////

D. Petitioner was denied effective assistance of Counsel on Appeal From the Post-Conviction Proceedings in violation of the 14th, Amendment OF The United States Constitution.

Supporting FACTS (state *briefly* without citing cases or law):
Petitioner's defence [*sic*] counsel on Appeal Mr. RONALD M. HELLEWELL failed to follow the RULES OF APPELLATE PROCEDURE when he typed up the Appeal Brief on the denial of relief in the State Post-Conviction Proceedings as a result Petitioner's case was affirmed without opinion and the Court Of Appeals did not hear petitioner's case on the merits. End./

13. If any of the grounds listed 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: There is no state Court Rule or State Statute giving a court jurisdiction to grant relief in a situation as that faced by petitioner at present; Petitioner's case is unique on this point; it is a case of first impression.See Attached Memorandum of law this one issue. End.//////////////////////////

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing ATTORNEY AT LAW : TOMMY HAWK#69070, Suite 301, 700 S.W. TAYLOR, Portland,Oregon 97305.

(b) At arraignment and plea SAME AS ABOVE : (a).

(c) At trial same as above :(a).

(d) At sentencing same as above :(a).

(e) On appeal NO APPEAL WAS EVER DONE.

(f) In any post-conviction proceeding ATTORNEY AT LAW : RONALD N. HELLEWELL, 475 COTTAGE N.E., Suite 250, Salem,Or. 97301.

(g) On appeal from any adverse ruling in a post-conviction proceeding SAME AS ABOVE: (f).

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☑

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☑

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

/s/ X Jose Tamayo Reyes
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 1-1988
(date)

/s/ X Jose Tamayo Reyes
Signature of Petitioner

AFFIDAVIT OF SPANISH TRANSLATOR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOSE TAMAYO REYES,	)	
	)	Civil No. 88-6061-E
Petitioner,	)	
	)	AFFIDAVIT OF
vs.	)	SPANISH TRANS-
	)	LATOR MERCEDES
J.C. KEENEY,	)	R. EDGERTON
	)	
Respondent.	)	

STATE OF OREGON)
) ss.
County of Multnomah)

I, Mercedes Edgerton, being first duly sworn, depose and say:

1) At the request of Mr. Steven Jacobson, attorney of law representing Jose Tamayo-Reyes in the above captioned case, I have read and reviewed written material from the state post-conviction proceeding including the deposition of Mr. Dennis Sanchez.

2) I was asked to evaluate those documents because Spanish is my native language, I have over thirty years of experience teaching English and Spanish at the university level and over ten years experience translating and interpreting from English into Spanish and Spanish into English. I have worked as a teacher, translator, interpreter, and language consultant. I have performed

several hundred hours of in-court interpretation in U.S. Immigration Court, U.S. Federal Court, and Circuit and District Courts in the State of Oregon. My background and experience is more fully set forth in the resume which is attached to this affidavit.

3) Judging from the sample of the Spanish used by Mr. Sanchez in said deposition, it is the opinion of this evaluator that it was confusing and misleading. For example, when asked what word or phrase he had used to communicate "murder", Mr. Sanchez said, "matador." The word "matador" is an adjective meaning "that kills" as for example: "Arsenic is a substance that kills." The words Mr. Sanchez should have used for the English word "murder" were "asesinato" or "homicidio." Starting on line 23 of page 11 of the said deposition, Mr. Sanchez's Spanish rendition of the English "...that he had killed somebody without the right to do so." was "queusted mato una persona permysso dercheo paramata" This Spanish rendition does not convey the intent of the English phrase. The English equivalent of what Mr. Sanchez said in Spanish is "that you killed a person permission (sic) right to you/he/she/kill/s." This is assuming that the word spelled "permysso" was meant to be "permiso" and the word spelled "dercheo" was meant to be "derecho." The proper Spanish rendition of "that he had killed somebody without the right to do so" is "que el habia matado a alguien sin haber tenido permiso para hacerlo."

The above examples are strong indications that the communication between Mr.Sanchez and Mr. Tamayo-Reyes was confusing and very likely misunderstood. Whether Mr. Sanchez used first person or third person to conduct his interpretation assignments could greatly change the meaning of what was being said to Mr. Tamayo-Reyes and vice versa.

4) Given the written transcript of Mr. Sanchez's deposition, one cannot reach any certain conclusions about his ability or inability to interpret court proceedings to Mr. Reyes. From what little information is there, I have pointed out what appeared to me to be serious shortcomings in his translation. In fairness to all concerned, I believe an oral evaluation of Mr. Sanchez's Spanish and his ability to interpret in court should be undertaken. In any event, much more information is needed before anyone could determine that Mr. Sanchez was an adequate interpreter.

DATED this 14th day of June, 1989.

[Signature and certification omitted in printing]

Mercedes R. Edgerton
3207 N.E. 98th Circle
Vancouver, WA 98665
(206) 574-3826

R E S U M E

PERSONAL DATA:

Date of Birth: September 13, 1929

Birthplace: Guatemala City, Guatemala, C.A.

Nationality: Guatemalan

Permanent Alien Registration No.: A-10 564 932

Marital Status: Married

Soc. Sec. No.: 521-40-0895

EDUCATION:

Monterey Institute of International Studies Monterey, California	Course In Court Interpretation July and August 1987
North Seattle Community College, Seattle, Washington	Business Administration 1971-1972
University of Washington Seattle, Washington	Behavioral, Abnormal and Child Psychology; Art Appreciation 1958-1959
Foreign Service Institute Department of State Washington, D.C.	Special Training on Audio-lingual Methodology 1956-1957
Universidad de San Carlos Guatemala City, Guatemala C.A.	Spanish Literature and Linguistics 1952-1953
Georgian Court College Lakewood, New Jersey	Liberal Arts Program 1947-1948

St. Genevieve-of-the-Pines Asheville, North Carolina	High School Diploma 1947

Member: California Court Interpreters Association
National Association of Judiciary Interpreters and Translators
American Translators Association

In 1956 I was awarded an academic scholarship to the University of Miami, Ohio

EMPLOYMENT:

Free-Lance Interpreter/Translator Spanish/English English/Spanish	1985 to present
Technical Translator	1988 to present
Hewlett-Packard, Vancouver Division 14110 S.E. 34th Street Camas, WA 98809 (206) 254-1810 Mr. Don Barnett, Learning Products Mgr.	DUTIES: Ready for publication translations of all users manuals
Transcription and Translation	1987 to present
U.S. Department of Justice Immigration & Naturalization Service 511 N.W. Broadway Portland, OR 97209	DUTIES: Transcription and translation of confidential material.
Drug Enforcement Administration 1220 S.W. Third Portland, OR 97205	DUTIES: Transcription and translation of confidential material.

Court Interpretation:	DUTIES:
U.S. Federal Court, Portland, OR Mr. Steve Wax, Director Federal Public Defender Office 615 SW Broadway, Suite 200 Portland, OR 97205 Mr. Stephen R.Sady Chief Deputy Federal Public Defender 615 SW Broadway, Suite 200 Portland, OR 97205	In court and out of court interpretation for witnesses and defendants.
Oregon District Court, Portland, OR Ninth District Immigration Court Portland, Oregon The Honorable William F. Nail Jr. and The Honorable Daniel F. Kahn Presiding Judges	Duties: In court interpretation during immigration court proceedings.
Circuit and District Courts for Multnomah County 1021 S.W. Fourth Avenue Portland, OR 97204	DUTIES: In court and out of court interpretation for witnesses and defendants.
Medical Interpretation:	1982 to present
Northwest Pain Center 10615 S.E. Cherry Blossom Dr. Portland, OR 97215 Dr. Joel Serea, Director	DUTIES: Interpret during medical evaluation and treatment.

Orthopaedic Consultants, P.C. 2525 N.E. Lovejoy — Suite 400 Portland, OR 97210	1985 to present DUTIES: Interpretation during medical examination and/or evaluation of patients.
Western Medical Consultants, Inc. 1099 S.W. Columbia — Suite 300 Portland, Oregon	Same as above.
Portland Orthopedic Clinic PC 3025 North Vancouver Portland, Oregon	Same as above.
Stephen J. Thomas, M.D., P.C. 17600 S.W. Alexander Aloha, Oregon	Salem as above.
John B. Hardman, M.D., P.C. 10202 S.E. 32, Suite 101 Milwaukie, Oregon	Same as above.
Orthopaedic Panel Consultants Dr. Donald L. Stainsby 1120 Cherry, Suite 230 Seattle, Washington	1980 to 1986 Same as above.

Interpretation for Administrative Hearings and Legal Depositions

1980 to present

DUTIES:
Interpretation during legal procedures which included interpretation in a week long deposition related to an international multimillion dollar law suit in Seattle, Washington.

Portland School of Languages
1422 East Burnside
Portland, Oregon
Mr. Dieter Waiblinger, Director

Spanish Teacher, Interpreter, and Translator

1986 to present

DUTIES:
Direct method is used for all instructions. I am reponsible [*sic*] for the training of new teachers.

Berlitz School of Languages
1525 Fourth Avenue
Seattle, Washington
Mr. Jeff Barger, Director

Spanish/English Teacher/ Interpreter/Translator

1980 to present

DUTIES:
Besides my teaching duties at this prestigious institution, I am the method teacher in Seattle/Portland.

University of Washington
College of Education Advisory Office
311 Miller Hall DQ-12
Seattle, Washington
Dr. Norma Dimmitt, Director

1973 to 1979

DUTIES:
Assist Administrative supervisor in the general management of said office.

University of Washington
College of Arts and Sciences
Romance Languages Department
Padelford Hall GN-60
Seattle, Washington
Dr. Marcelino Penuelas, Chairman

1972 to 1973

DUTIES:
Same as above

North Seattle Community College
College of Arts and Sciences
9600 College Way North
Seattle, Washington
Dr. Stafford Miller, Chairman

Spanish Teacher
Elementary, Intermediate and Advanced Spanish Courses

Spring Quarter 1972

DUTIES:
Emphasis was given to oral expression at all levels in instruction

Central T.V.
306 Dexter Avenue North
Seattle, Washington
Mr. Lee Wagoner, Owner

1970 to 1971

DUTIES:
Customer service Representative. This involved a great deal of contact with the public.

University of Washington
College of Arts and Sciences
Department of Romance Languages
Dr. Howard L. Nostrand, Chairman

1962 to 1966

DUTIES:
The emphasis was on oral expression, and the topics varied from simple literary analysis to current events.

The Bon Marche
Fourth and Pine
Seattle, Washington
Ms. Amy Martin, Manager

1958 to 1962

DUTIES:
Sales of various merchandize. Gave me a great insight in dealing with the general public

Seattle Public Schools
815 4th Avenue North
Seattle, Washington
Ms. Edna Babcock,
Director, Foreign Languages

Spanish Television Teacher

1958 to 1960

DUTIES:
Spanish television series for the third, fourth and fifth grades. The series for the 4th grade was nominated for an "Emmy".

Foreign Service Institute (FSI)
Department of State
Washington, D.C.
Dr. J. Donald Bowen, Director

Spanish Teacher

1954 to 1956
Guatemala City
1956 to 1957
Washington, D.C.

DUTIES:
Taught university level Spanish courses to foreign service personnel and their dependents

Institute Guatamaltaco Americano
(IGA)
Guatemala City, Guatemala
Central America
Ms. Alice Barrett Rudd, Director

English Teacher

1953 to 1956

DUTIES:
Taught university level English to adults. Oral expression was emphasized

OPINION OF NINTH CIRCUIT COURT OF APPEALS

[Opinion set forth in full as Appendix A, pages App-1 through App-25 of the printed petition for certiorari]

OPINION OF THE UNITED STATES DISTRICT COURT

[Opinion set forth in full as Appendix B, pages App-27 through App-32 of the printed petition for certiorari]

MAGISTRATE'S FINDINGS AND RECOMMENDATION

[Opinion set forth in full as Appendix C, pages App-33 through App-38 of the printed petition for certiorari]

(4)

No. 90-1859

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is "deliberate by-pass" or "cause and prejudice" the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state court?

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U.S. Supreme Court Rule 13.1 1

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Tamayo-Reyes v. Keeney*, 926 F.2d 1492 (9th Cir. 1991). Neither the magistrate's findings and recommendation nor the district court's opinion is reported.[1]

JURISDICTION

Section 1254(1) of Title 28 gives the Court jurisdiction to issue a writ of certiorari to the federal courts of appeals. The court of appeals' judgment was entered on March 4, 1991. A timely petition for certiorari was filed on June 3, 1991. *See* 28 U.S.C. section 2101(c); Supreme Court Rule 13.1.

STATUTES INVOLVED

Section 2254(d) of Title 28 provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved by the State court hearing;

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[1] Copies of the Ninth Circuit's opinion, the district court's opinion, and the magistrate's findings and recommendation are reproduced in the appendix to the petition for certiorari.

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when the proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden

shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

Respondent Jose Tamayo-Reyes was convicted of manslaughter. The death occurred during a knife fight between Tamayo-Reyes and his fiancée in a Portland, Oregon tavern. When a stranger tried to break up the fight, Tamayo-Reyes turned, stabbed the stranger, and killed him. The State charged Tamayo-Reyes with murder. An attorney was appointed to represent him. Because Tamayo-Reyes spoke little or no English, an interpreter, Ben Sanchez, was also appointed. Not only is Spanish Sanchez' native language, but he is an attorney as well.

Before trial, Tamayo-Reyes chose to plead no contest to a lesser charge of first degree manslaughter.[2] Before doing so, he and his attorney filled out a plea petition. The petition specified the rights Tamayo-Reyes was giving up, the crime to which he was pleading, the maximum sentence possible, the sentence the district attorney recommended, and the factual basis for the plea. *See* J.A. 10-14. Paragraph 4 of the signed plea petition stated:

> I told my lawyer all the facts and circumstances known about the charges against me. I believe that my lawyer is fully informed on all such matters. My lawyer has counseled and advised me on the nature of each charge; on any and all lesser included charges; and on all possible defenses I might have in this case.

J.A. 10. Additionally, Tamayo-Reyes' trial attorney certified that he "ha[s] had read and fully explained to the defendant the allegations contained in the indictment in this case." J.A. 13.

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[2] When Tamayo-Reyes committed the homicide in 1984, Or. Rev. Stat. § 163.118(1) provided: "Criminal homicide constitutes manslaughter in the first degree when [i]t is committed recklessly under circumstances manifesting extreme indifference to the value of human life."

Before the state trial court accepted the no-contest plea, it questioned Tamayo-Reyes' attorney about the plea petition. His attorney told the court:

> I had Mr. Sanchez translate the English [plea petition] form, from English to Spanish, directly to the defendant in my presence. Mr. Sanchez went over the form with him in Spanish. I asked [Tamayo-Reyes] if he understood it. He indicated he did understand it, and did wish to proceed as we contemplate proceeding this morning.

J.A. 3. The state trial court questioned Sanchez about his ability as a translator.[3] J.A. 3. It then advised Tamayo-Reyes of his rights a second time. It detailed on the record the rights he was giving up and asked whether he understood what it had explained to him. J.A. 4-5. When Tamayo-Reyes responded, "More or less," the court was careful to be sure he understood. *See* J.A. 5-7.

The trial court explained: "You have two choices: You can have a jury trial on the charge of murder, or you can be convicted at this time, by your agreement of the charge of manslaughter." J.A. 6. At this point, Tamayo-Reyes' counsel asked to speak with his client. After an off-the-record discussion among Tamayo-Reyes, Sanchez, and the defense attorney, Tamayo-Reyes agreed to the plea. J.A. 6. The trial court asked whether Tamayo-Reyes now understood his right to have a jury trial on the charge of murder, whether he chose instead to be convicted of the charge of manslaughter, and whether he understood that his decision could lead to his deportation. J.A.

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[3] The court asked whether Sanchez read, wrote, and spoke Spanish fluently. J.A. 3. Sanchez replied that he spoke it, but did not read or write it. J.A. 3. Sanchez' fluency in Spanish was later explored at greater length in the post-conviction proceeding. *See* J.A. 22-23, 26-29.

6. Tamayo-Reyes replied yes to each of these questions. J.A. 6. Based on Tamayo-Reyes' responses and the signed plea petition, the trial court found that Tamayo-Reyes knowingly and voluntarily "chose to plead no contest and accept the consequences of a conviction for manslaughter in the first degree." J.A. 8.

Approximately a year later, Tamayo-Reyes filed a petition for state post-conviction relief. An attorney was appointed to represent him, and the full panoply of procedures — discovery, compulsory process, and cross-examination — was available to develop Tamayo-Reyes' claims. Tamayo-Reyes, through his attorney, filed an amended post-conviction petition. The amended petition alleged that Tamayo-Reyes' no-contest plea was not knowingly and voluntarily entered.[4] J.A. 16. The focus of the post-conviction petition was that Tamayo-Reyes had not understood that he had given up the right to a jury trial. J.A. 16-17. He alleged that his interpreter Sanchez failed to make clear to him that the charge was being reduced from murder to manslaughter only in return for what was, in effect, a guilty plea. J.A. 16-17.

Tamayo-Reyes' testimony at his post-conviction hearing tracked the allegations in his post-conviction petition. He testified that he remembered signing the plea petition but did not understand he was waiving his right to a jury trial. J.A. 39-41. He said that Sanchez had told him to sign the plea petition without explaining what it was and that Sanchez had assured him he would still have a jury trial. J.A. 40. In closing argument,

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[4] The amended post-conviction petition contained three claims for relief. The Ninth Circuit held that Tamayo-Reyes abandoned the last two claims. *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1494 n. 2. Tamayo-Reyes has not filed a cross-petition for certiorari challenging that portion of the Ninth Circuit's decision.

Tamayo-Reyes' attorney raised an issue that neither the amended petition nor Tamayo-Reyes' testimony had suggested. He argued that Sanchez had provided Tamayo-Reyes with a "very incomplete" interpretation of manslaughter.[5] J.A. 44.

After considering the evidence, the state post-conviction court made the following findings:

> 1. Petitioner's plea of [no-contest] was knowingly and voluntarily entered.
>
> 2. Petitioner was properly served by an interpreter in the proceedings leading to his conviction.
>
> 3. The interpreter correctly, fully, and accurately translated the communications between Petitioner and his attorney.
>
> 4. Petitioner has not sustained his burden of proof in regard to any of the allegations in his petition.
>
> 5. Representation by [trial] counsel was reasonable and effective under the circumstances.

J.A. 51. Based on these findings, the state post-conviction court denied Tamayo-Reyes relief. J.A. 51. The Oregon Court of Appeals affirmed, *Reyes v. Keeney*, 88 Or. App. 187, 744 P.2d 1011 (1987), and the Oregon Supreme Court declined to grant discretionary review, *Reyes v. Keeney*, 304 Or. 680, 748 P.2d 142 (1987).

Tamayo-Reyes then filed a habeas petition in federal court. His federal habeas petition alleged, as his state post-conviction petition had, that his plea was neither knowing nor voluntary because he had not understood that pleading no-contest meant he

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[5] The argument was based on a passage from Sanchez' deposition. *See* note 6 *infra*. Tamayo-Reyes had never alleged nor testified that he did not know the elements of manslaughter.

was giving up his right to a jury trial. J.A. 56-57. He also argued, as he had in the closing moments of the state post-conviction proceeding, that the interpreter had not provided a complete or accurate definition of manslaughter. *See* Pet. Cert., App-32. He asked for a federal evidentiary hearing to develop additional evidence on the adequacy of Sanchez' translation. *See* Pet. Cert., App-34.

On this latter point, Tamayo-Reyes appears to have argued that his state post-conviction counsel failed to develop two related but separate types of evidence. First, he faulted his state post-conviction counsel for failing to inquire more fully during Sanchez' deposition what Spanish phrases Sanchez used to translate the elements of manslaughter.[6] Second, he faulted his state post-conviction counsel for failing to introduce expert testimony that would have allowed the post-conviction court to determine whether Sanchez' command of Spanish was sufficient.[7] These failures, Tamayo-Reyes argued, entitled him to a federal evidentiary hearing.

The federal district court denied Tamayo-Reyes' habeas petition. It held that the state post-conviction court's factual

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[6] During the deposition, Tamayo-Reyes' post-conviction counsel asked Sanchez whether he recalled "specifically some words that [he] used" almost two years earlier to translate the elements of murder and manslaughter. J.A. 26. Sanchez could recall some of the specific words he used, but not all of them. J.A. 26-27.

[7] In closing argument in the post-conviction court, Tamayo-Reyes' counsel relied on his own knowledge of Spanish to argue that the Spanish translation Sanchez remembered telling Tamayo-Reyes was incorrect. J.A. 42-43. When the State objected that counsel was going beyond the record, Tamayo-Reyes' counsel explained that he could make the same point relying on the English explanation of Sanchez' Spanish, which was in the record. J.A. 43-44. The state post-conviction court considered the argument based on the English explanation.

findings disposed of Tamayo-Reyes' federal claims. It also rejected Tamayo-Reyes' claim that a new evidentiary hearing was required because his counsel failed to develop material facts at the state post-conviction hearing. The court found that Tamayo-Reyes had not established that the failure to do so was not due to inexcusable neglect. Pet. Cert., App-32.

The Ninth Circuit reversed and remanded. *Tamayo-Reyes v. Keeney*, 926 F.2d, at 1502. It concluded that material facts were not adequately developed at the state post-conviction hearing — specifically, the way in which Sanchez translated the mental element of manslaughter. *Id.*, at 1500. It held that federal courts need not defer to state court fact findings unless the failure to develop the material facts in state court was due to the habeas petitioner's deliberate by-pass. *Id.*, at 1501-02. Under the Ninth Circuit's reasoning, the deliberate by-pass standard announced in *Fay v. Noia*, 372 U.S. 391 (1963), provides the applicable test when a habeas petitioner seeks to have the federal courts reconsider factual disputes the state court has already resolved. *Ibid.*

SUMMARY OF ARGUMENT

The Court has recognized the power of a federal habeas court to reach a state prisoner's unpreserved federal claims. With that recognition, the Court has observed that this power must be exercised in a way that fosters and preserves a proper balance in the relationship between state and federal courts. The Court initially viewed the "deliberate by-pass" test as an appropriate accommodation of federalism policies. Since then, however, the Court has acknowledged that this standard seriously erodes the importance of the state judicial process and protracts litigation unnecessarily. As a result, the "deliberate by-

pass" standard for the most part has been abandoned and the "cause and prejudice" test has been embraced in its place.

This case presents one of the few contexts, if not the only one, in which deliberate by-pass still applies. *Townsend v. Sain*, 372 U.S. 293 (1963), articulates deliberate by-pass as the correct test when a petitioner seeks a federal hearing because facts material to his claim were not developed in the state court proceedings. *Townsend* relies on case law this Court has since disavowed and on policies it has since reassessed. Its use of deliberate by-pass as a standard undermines comity and federalism concerns in ways that have caused the Court to reject the test in other cases. Specifically, it renders the state court procedures secondary to federal habeas, it unduly protracts litigation, and it burdens federal court resources.

The only argument that can be made to defend *Townsend*'s use of the deliberate by-pass test is that a petitioner's failure to develop the material facts fully in his state trial is somehow different from the failure to raise his federal claim altogether. To the contrary, however, the two situations are essentially identical and any distinction would be artificial. As a result, for the reasons the Court has abandoned the deliberate by-pass test in failure to preserve contexts, it should abandon the test here. Such a holding is true to the Court's precedents, to the federal-state policies that should guide the inquiry, and to the language and policy of the federal statutes that govern habeas proceedings.

ARGUMENT

This case presents the Court with a narrow and straightforward question: Whether deliberate by-pass is the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state court, thus entitling a petitioner to a new evidentiary hearing in federal court. *Fay v.*

Noia, 372 U.S., at 430-431, held that federal courts have the power to consider a state prisoner's unpreserved federal claims, but that they retain discretion to deny the writ when a habeas petitioner has "deliberately by-passed the orderly procedure of the state courts." *Id.*, at 438. *Townsend v. Sain*, 372 U.S. 293 (1963), decided the same day, extended *Fay*'s deliberate by-pass test to circumstances in which "the material facts were not adequately developed at the state-court hearing." In both cases, the Court recognized that granting federal hearings on claims that were not preserved in state court ran the risk that there would be little incentive for state prisoners to take state proceedings seriously. The Court concluded, however, that refusing to grant a federal hearing when the petitioner had knowingly waived a state process of which he was fully aware (a "deliberate by-pass") would serve to balance state and federal interests appropriately.

Since *Fay* and *Townsend* were decided, the Court has reconsidered the balance it struck between state and federal interests. In each instance, in the context of a habeas petitioner's failure to preserve a federal claim in state court, the Court has rejected the deliberate by-pass test and adopted the cause and prejudice test in its place. The Court has reasoned that the deliberate by-pass standard provides petitioners with too little incentive to litigate their federal claims fully in state court and it gives too little weight to the States' interest in finality of convictions. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *Engle v. Isaac*, 456 U.S. 107, 127 (1982); *Murray v. Carrier*, 477 U.S. 478, 487 (1986). In retreating from the deliberate by-pass test, the Court initially limited *Fay* to its facts. *Wainwright v. Sykes*, 433 U.S., at 88 and n. 12. Last term, the Court expressly disavowed *Fay* and rejected its rationale altogether.

Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. 2546, 2565 (1991).

Given these doctrinal developments, the question in this case reduces to this: Whether the policies that have caused the Court to reject "deliberate by-pass" in all other contexts apply with equal force when a petitioner seeks a federal evidentiary hearing on the ground that a material fact was not developed in state court. More precisely, the question is whether *Townsend* is still good law. In the State's view, the Court's decisions since *Fay* provide the short answer to that question. The holdings in *Wainwright*, *Murray*, and *Coleman* compel the conclusion that the Ninth Circuit erred in holding that deliberate by-pass remains the proper test for determining a habeas petitioner's right to a federal evidentiary hearing. The same result follows from a more complete examination of the context in which *Townsend* was decided, the costs *Townsend*'s standard imposes on state-federal relations, the Court's compelling rationale in *Wainwright*, *Coleman*, and other cases, and the policies underlying 28 U.S.C. section 2254(d).

A. Townsend and Its Costs.

Initially, a person sentenced for a state crime had no right to seek federal habeas. *See McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454, 1461-1462 (1991); *Brown v. Allen*, 344 U.S. 443, 499 (1953) (Opinion of Frankfurter, J.). Congress did not extend federal habeas to persons held in state custody until 1867, *ibid.*,[8] and the Court was quick to recognize that the 1867 Act

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[8] A majority of the Court in *Brown* suggested that the constitution did not require Congress to extend federal habeas to state prisoners. *See Brown v. Allen*, 344 U.S., at 499 (Opinion of Frankfurter, J.); *id.* at 488 (Opinion of Burton and Clark, JJ.) (recognizing propriety of Justice Frankfurter's views);

(continued...)

imposed a concomitant obligation on federal courts to exercise their newly granted jurisdiction consistent with principles of federalism, *Ex Parte Royall*, 117 U.S. 241, 251 (1886). As Justice Harlan explained in *Ex Parte Royall*, the federal power to re-examine state convictions must be exercised "in recognition of the fact that the public good requires that th[e] relations [between the federal government and the States] be not disturbed by unnecessary conflict by courts equally bound to guard and protect rights secured by the Constitution." *Ibid.*

The substantive scope of the federal authority to re-examine state convictions has been subject to dispute. *Compare Brown v. Allen*, 344 U.S., at 462-465 (federal courts may re-examine any claim of constitutional error that was fully litigated in state court), *with* Bator, *Finality in Criminal Law*, 76 HARV. L. REV. 441 (1963) (federal courts' habeas jurisdiction limited to claims that state court lacked jurisdiction or failed to provide adequate corrective processes). One principle has remained constant, however: The Court has recognized that a federal district court sitting in habeas ordinarily should defer, as a matter of comity and federalism, to the state court's resolution of historical facts. The Court explained in *Brown v. Allen*, 344 U.S., at 463, "if the [federal district] court is satisfied, by the [state court] record, that the state process has given fair consideration to the issues

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[8](...continued)
id. at 513 (Opinion of Black and Douglas, JJ.) (agreeing with Justice Frankfurter's views). Justice Frankfurter reasoned:

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution.

344 U.S., at 499.

and the offered evidence, and has resulted in a satisfactory conclusion," "a repetition of the trial is not required."[9]

Townsend v. Sain begins from the same principle. It recognizes that a federal court "may, and ordinarily should, accept the facts" found by the state court when the habeas petitioner has been "afforded a full and fair hearing." 372 U.S., at 318. *Townsend* goes beyond *Brown*, however, in explaining when a federal court is required to hold a new evidentiary hearing. *Brown* focused on a flaw in the fact-finding process as the justification for a federal evidentiary hearing. 344 U.S., at 463, 506. *Townsend* reasons that a new federal evidentiary hearing is also required when "the material facts were not adequately developed at the state court hearing," subject only to the petitioner's deliberate by-pass. 372 U.S., at 313, 317. *Townsend* thus shifts the focus from the reliability of the state fact-finding process to the reliability of the particular facts the state court found.

Townsend's shift has a significant impact on both finality of convictions and relations between the state and federal governments. Pursuant to *Townsend*, a federal habeas petitioner may relitigate the validity of his state conviction whenever he can think of a single material fact that he inadvertently failed to present to the state court. It is the rare habeas petitioner who cannot envision how his case might have been tried better, and

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[9] As Justice Frankfurter put it in *Brown*, when a habeas petitioner's federal claim turns on basic facts that "have been tried and adjudicated against the [petitioner]," a federal court may deny the petition absent a "vital flaw . . . in the process of ascertaining such facts." 344 U.S., at 506 (Opinion of Frankfurter, J.). Although *Brown* recognized that federal courts have the power to hold new evidentiary hearings in every case, it also recognized that a federal court should ordinarily defer to state fact findings absent some flaw in the state procedures.

Townsend's shift from the reliability of the process to the elimination of potential error makes virtually every state conviction subject to re-examination in federal court.

The resulting diminution of finality is not so much a consequence of the recognition that federal courts have the power to hold new evidentiary hearings. *Brown* establishes that much. It results instead from the test *Townsend* and *Fay* state for the exercise of that power. Rather than requiring a habeas petitioner to show some cause for failing to present his evidence to the state court, the only limit *Townsend* expresses to the continual relitigation of facts underlying a federal claim is the petitioner's deliberate by-pass.

Townsend's change of focus also impairs the relations between state and federal courts. Basing the right to a federal evidentiary hearing on a habeas petitioner's failure to take advantage of the state proceedings diminishes the significance of the state hearings. It exacerbates the "inevitable friction" that arises when a federal habeas court effectively is asked to "overtur[n] either the factual or legal conclusions reached by the state-court system," *Sumner v. Mata*, 449 U.S. 539, 550 (1981). Deliberate by-pass does not provide sufficient protection for the State's interests. It leaves habeas petitioners with little incentive to take the state proceedings seriously. It converts the state hearing from "'the main event'" into a "'a tryout on the road' for what will later be the determinative federal hearing," contrary to the reasoning in *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

To be sure, if the state procedures did not provide an adequate or fair opportunity to develop the facts, the issue would be different. Or if a habeas petitioner could show some good reason for failing to develop his evidence in the state proceeding, then a new evidentiary hearing would perhaps be justified. But *Townsend* does not condition the right to a federal evidentiary hearing on establishing cause (much less prejudice) for failing to bring material facts to the state court's attention. Rather, it reasons that absent deliberate by-pass, any failure to take advantage of the state proceedings will entitle a habeas petitioner to a new evidentiary hearing in federal court. That reasoning imposes significant costs on both the finality of convictions and federalism.

B. Cause and Prejudice Applies Equally to Evidentiary Hearings.

These same costs have convinced the Court to make cause and prejudice, not deliberate by-pass, the test for determining when to excuse a petitioner's failure to raise a federal claim in state court. *Coleman v. Thompson*, 111 S. Ct., at 2563-2565; *McCleskey v. Zant*, 111 S. Ct., at 1471; *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107, 126-127; *Wainwright v. Sykes*, *supra*. With respect to finality, the Court has recognized that deliberate by-pass denies society's and the individual defendant's "'interest in insuring that there will at some point be the certainty that comes with an end to litigation'" and that attention will "'be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.'" *Coleman v. Thompson*, 111 S. Ct., at 2564 (quoting *Sanders v. United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)). As the Court explained in *McCleskey v. Zant*, 111 S. Ct., at 1468 "[t]hough *Fay v. Noia*, *supra*, may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality."

With respect to comity and federalism, the Court has recognized that deliberate by-pass diminishes the significance of the state proceedings. *Murray v. Carrier*, 477 U.S., at 487; *Wainwright v. Sykes*, 433 U.S., at 90. It gives too little weight to the States' interest in enforcing procedural rules that are designed to bring a conclusion to litigation. *Ibid.* It denies States the opportunity to consider the petitioner's federal claims, and it deprives them of the opportunity to correct any error in the proceedings. *Ibid.*

The reasoning in *Coleman*, *McCleskey*, and *Wainwright* applies with equal force to the issue here. Relitigating facts that could have been but were not developed in state court imposes the same costs on finality that relitigating unpreserved issues does. Both denigrate state procedural rules that are designed to make the state hearing the focus of the habeas petitioner's federal claims and bring the matter to a conclusion. Each effectively shifts the petitioner's focus and society's resources from reformation to a continual search for possible error. Each deprives the state court of the opportunity to decide the petitioner's federal claim, diminishes the role of the state hearing, and unnecessarily increases the friction between coordinate systems of government.

Not only does the rationale of the Court's more recent decisions demonstrate that cause and prejudice should govern a habeas petitioner's right to a new evidentiary hearing, but the reasoning in *Townsend* points in the same direction. *Townsend* acknowledged that the same standard should apply whether a habeas petitioner sought to have the courts consider an issue he failed to raise in state court or a material fact he failed to develop in state court. *Townsend v. Sain*, 372 U.S., at 317. If cause and prejudice now governs the former issue, as cases

decided since *Townsend* have concluded, it follows that it should also govern the latter. It would make little sense to hold a criminal defendant responsible for raising all federal issues in state court (or show cause and prejudice for failing to do so) but not hold him equally responsible for presenting all evidence material to the resolution of those claims to the state court. Each default imposes the same costs on federalism and on the States' interest in the finality of convictions.

C. Section 2254(d).

Not only does the case law require the application of cause and prejudice but the same result also follows from the 1966 amendments to 28 U.S.C. section 2254. Three years after the Court decided *Townsend*, Congress amended section 2254 to address evidentiary hearings. *See Sumner v. Mata*, 449 U.S. 539 (1981). The purpose of the amendment was to minimize the "inevitable friction" that arises when a federal court is asked in effect to "overtur[n] either the factual or legal conclusions reached by the state-court system." *Sumner v. Mata*, 449 U.S., at 550. Congress accomplished this goal by requiring federal courts to give a presumption of correctness to state court fact findings unless one of eight exceptions was established.

One of these exceptions recognizes, as *Townsend* does, that state court factual findings will not be presumed correct when material facts were not adequately developed in the state proceeding. 28 U.S.C. § 2254(d)(3). The language of that exception does not address whether Congress intended deliberate by-pass or cause and prejudice to govern its application. But Congress' goal of minimizing the friction that occurs whenever a federal habeas court overturns "the factual . . . conclusions reached by the state-court system" supports the latter interpreta-

tion. *See Sumner v. Mata*, 449 U.S., at 550. The deliberate bypass test would increase, not minimize, the friction.

Moreover, the Court recently held that a related statutory provision, 28 U.S.C. section 2244(b), prohibits successive petitions unless the petitioner can establish cause and prejudice for failing to raise all his issues in the first petition. *McCleskey v. Zant*, 111 S. Ct., at 1470. Section 2244(b) and section 2254(d) were enacted in the same 1966 bill. *See* 80 Stat. 1104-1106. There is no reason to think that Congress intended that cause and prejudice would apply to the section of the bill on successive petitions, but not to the section concerning evidentiary hearings. Indeed, in *Brown v. Allen*, 344 U.S., at 463, the Court recognized that logically the same standard should apply to both situations.

> [T]his Court approved in *Salinger v. Loisel* 265 U.S. 224, 231, the procedure that a federal judge might refuse a writ where application for one had been made to and refused by another federal judge and the second judge is of the opinion that in light of the record a satisfactory conclusion has been reached. That principle is also applicable to state prisoners. *Ibid.* (footnote omitted).[10]

The legislative history leads to the same conclusion. The most detailed explanation of what is now section 2254(d) comes from a report the Habeas Committee of the Judicial Conference of the United States prepared in 1964.[11] Before presenting the

---

[10] The legislative history of section 2254(d) quotes this passage from *Brown*. *See* H.R. Rep. No. 1384, 88th Cong., 2d Sess., 24-25 (1964). For an explanation of the relevance of the 1964 legislative history, see note 11 *infra*.

[11] The Habeas Committee proposed the first version of what is now § 2254(d) to Congress in 1964. *See* H.R. Rep. No. 1384, *supra*, at 19-20 (setting out proposed bill). The Committee's explanation was presented to (continued...)

text of the subsection, the report notes that "it may be helpful to refer to certain adjudicated cases." H.R. Rep. No. 1384, 88th Cong., 2d Sess., 23 (1964). The quotations included in the report emphasize both the federal courts' power to redetermine the facts and the need for deference to state fact finding. *Id.*, at 24-25. The report thus notes the statement from *Brown v. Allen*, 344 U.S., at 458 that "where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the district court may properly depend upon the State's resolution of the issue." *Id.*, at 24. Similarly, it quotes *Brown* for the proposition that a federal court need not hold a new federal evidentiary hearing "where the legality of [the habeas petitioner's] detention has been determined, on the facts presented, by the highest State court with jurisdiction." *Id.*, at 25. And the report concludes by citing Professor Bator's article on Finality in Criminal Law, which reasons that the interest in finality of convictions should limit a federal court's authority to those cases in which the state procedures prevented the state

---

[11](...continued)
Congress in 1964 and included in the House Report. Although the 1964 bill did not pass, a substantially similar version of the bill, which became section 2254(d), was presented to Congress in 1966. H.R. Rep. No. 1892, 89th Cong., 2d Sess., 12-15 (1966); *accord* S. Rep. No. 1797, 89th Cong., 2d Sess., 7-10 (1966). The 1966 Habeas Committee Report explained that the bill was the same as in 1964 except that it no longer required a three-judge court to hold a hearing on a habeas petition. *Ibid.* Because the 1966 report does not address issues already covered in the 1964 report, the 1964 report provides the fullest discussion of section 2254(d).

courts from fairly considering the petitioner's federal claims.[12] *Ibid.*

The emphasis on finality and deference to state fact findings in the Judicial Conference Report mirrors the concerns that have led the Court to apply the cause and prejudice test in other areas. Those concerns support application of the same standard to determine when a habeas petitioner's failure to take advantage of state proceedings will entitle him to a new federal evidentiary hearing. Indeed, the Senate Report notes:

> [T]he proposed legislation, if enacted, will be a strong inducement to the States that have not already done so to provide adequate postconviction remedies and procedures to make and keep available records of evidentiary matter in criminal and postconviction proceedings, and to the State courts in criminal proceedings to safeguard the constitutional rights of defendants.

S. Rep. No. 1797, 89th Cong., 2d Sess., 3 (1966) (quoting Habeas Committee Report). Congress could not both have intended section 2254(d) to be an inducement to the States to develop their own post-conviction procedures and also have intended to make deliberate by-pass the test of when a habeas petitioner would receive a new evidentiary hearing. The two concepts are antithetical.

---

[12] *Townsend v. Sain*, *supra*, is mentioned only once in the Habeas Committee's report. *See* H.R. Rep. No. 1384, *supra*, at 24. The report quotes *Townsend* for the proposition that a federal district court's duty to scrutinize the state court record is no less exacting than the Supreme Court's duty to scrutinize the state record on direct review. *Ibid.*

Had Congress expressly stated that it intended to codify *Townsend*'s use of the deliberate by-pass standard, the issue would be different. Referring, however, to *Townsend*'s analogy to direct review provides little reason to infer that Congress intended to follow that course. It instead negates it.

D. The Court of Appeals' Judgment Should Be Reversed and Remanded.

Both this Court's cases and the congressional intent that can be gleaned from section 2254(d) demonstrate that the Ninth Circuit erred in holding that deliberate by-pass defines when a petitioner's failure to develop facts in state court will entitle him to a new evidentiary hearing. Cause and prejudice instead provides the correct standard.

On this record, it is appears that Tamayo-Reyes lacked cause. The only basis identified below for failing to develop the facts was his post-conviction counsel's omission, and *Coleman v. Thompson*, 111 S. Ct., at 2566-2567, establishes that such a failure is insufficient. When, however, Tamayo-Reyes requested a new evidentiary hearing in district court, it was unclear whether he had to establish cause and prejudice or merely the lack of a deliberate by-pass. Because he did not know he had to meet the higher standard, he may not have brought forward evidence to establish it. In these circumstances, a remand to the district court would be appropriate to allow Tamayo-Reyes to show, if possible, whether cause and prejudice excused his failure to develop the material facts in state post-conviction court.

CONCLUSION

For the reasons stated above, the court of appeals' judgment should be reversed and remanded.

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In The
Supreme Court of the United States
October Term, 1991

J. C. Kincheloe, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

Jose Tamayo-Reyes,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1859

J. C. KEENEY, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

JOSE TAMAYO-REYES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Jose Tamayo-Reyes is a Cuban immigrant with virtually no education. He is unable to read, write or speak English. At the proceeding at which he was found guilty on a plea of *nolo contendere*, Mr. Tamayo-Reyes was represented by an attorney who did not speak Spanish. The person appointed by the court to interpret did not read or write Spanish. J.A. 3. The transcripts reveal that Mr. Tamayo-Reyes did not understand what was happening. In the state post-conviction proceeding, the person who interpreted, Mr. Sanchez, admitted that his method of interpreting was to "just tell him what's happening." J.A. 30. He did not perform simultaneous interpretation.[1]

---

[1] "Simultaneous interpretation means interpreting the proceedings as they occur, at a normal rate, with no pauses to assist the inter-

Sanchez was not an official interpreter, but an attorney who happened to speak Spanish and was called upon "a couple of times . . . [if] they have to have somebody real quickly." J.A. 22. The Spanish words the interpreter used to tell Mr. Tamayo-Reyes what "murder," "manslaughter" and "knowingly" mean were simply incorrect.[2]

The facts of the underlying homicide raise substantial questions about whether a crime occurred and, if so, which degree of the offense.[3] Mr. Tamayo-Reyes and his girl-

---

preter." 2 *Criminal Law* § 14.17 (Oregon CLE 1986). Simultaneous interpreting is generally considered to be the most effective interpreting method utilized in courtroom settings. *See* 28 U.S.C. § 1827(k) (requiring that method to be utilized in federal courts); *see also infra* note 8.

[2] *See infra* pp. (6-8).

[3] The Oregon statutes define several degrees of homicide and the defense of self-defense. Murder is defined in Or. Rev. St. 163.115 as:

> (1) Except as provided in Or. Rev. St. 163.118 and 163.125, criminal homicide constitutes murder:
>
> (a) When it is committed intentionally, except that it is an affirmative defense that, at the time of the homicide, the defendant was under the influence of an extreme emotional disturbance;

Manslaughter in the first degree is defined in Or. Rev. St. 163.118 as:

> (1) Criminal homicide constitutes manslaughter in the first degree when:
>
> (a) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life; or
>
> (b) It is committed intentionally by a defendant under the influence of extreme emotional disturbance as provided in ORS 163.135. The fact that the homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing the homicide which would otherwise be murder to manslaughter in the first degree and need not be proved in any prosecution.

Manslaughter in the second degree is defined in Or. Rev. St. 163.125 as:

friend were drinking in a bar when they got into a fight. His girlfriend pulled out a knife, he pulled out a knife, a man approached carrying a small chair and was stabbed and died.[4]

The no contest plea was entered on a plea petition form used by the Multnomah County court. The form used in this case was, however, in English, not the Spanish version which was also available in that court. J.A. 3. That form had sections written in by hand.[5] Included was one statement raising a potential *mens rea* defense: that Mr. Tamayo-Reyes was "under the influence of alcohol at time of incident." J.A. 12. The request for a factual basis for the plea was completed with the statement: "I request court to consider testimony of witnesses who testified during my bail hearing as factual basis for my plea." J.A. 13. In the state post-conviction hearing, Mr. Tamayo-Reyes testified that he wanted the witnesses to come to court and believed that they were coming. J.A. 40-41.

The record of the change of plea hearing reveals Mr. Tamayo-Reyes' lack of understanding. The trial court

---

> (1) Criminal homicide constitutes manslaughter in the second degree when:
>
> (a) It is committed recklessly; or
>
> (b) A person intentionally causes or aids another person to commit suicide.

Criminally negligent homicide is defined in Or. Rev. St. 163.145 as:

> (1) A person commits the crime of criminally negligent homicide when, with criminal negligence, the person causes the death of anothe person.

Self-defense is provided for in Or. Rev. St. 161.205.

[4] The facts of the incident are taken from the transcript of sentencing in the state court. S.Tr. 1/22/85, pp. 3, 8. They do not appear in the plea transcript or petition.

[5] The trial attorney apparently placed the handwritten words on the form. J.A. 40. The retyped version in the Joint Appendix does not adequately represent the form.

recited Mr. Tamayo-Reyes' trial and constitutional rights in one lengthy paragraph, at the conclusion of which he asked: "Do you understand what I've explained to you?" Mr. Tamayo-Reyes responded "More or less." J.A. 4-5. The following exchange ensued:

> THE COURT: Do you have any questions that you want to ask me?
>
> THE WITNESS: No.
>
> THE COURT: Do you choose to plead no contest and have the conviction go on your record, rather than have a jury trial?
>
> THE INTERPRETER: He doesn't know anything about such things.
>
> THE COURT: Do you choose to have this conviction for manslaughter, rather than have a jury trial?
>
> THE INTERPRETER: He says, "I don't comprehend."

At this point the court repeated the two choices and the attorney asked for a moment during which a conference occurred off the record. When they returned, Mr. Sanchez stated: "He says, 'okay.'" J.A. 6. After some additional inquiry, the court accepted the plea of *nolo contendere*.

Less than one year after he was sentenced, Mr. Tamayo-Reyes filed a petition for post-conviction relief in the state court. The attorney assigned by the state court to represent Mr. Tamayo-Reyes on his petition incompetently litigated the question of the grossly inadequate interpretation during the plea proceeding and Mr. Tamayo-Reyes' lack of understanding of what occurred. The Ninth Circuit highlighted numerous errors on post-conviction counsel's part which rendered the evidentiary procedure utilized insufficient. Both the magistrate and the district court acknowledged Mr. Tamayo-Reyes' characterization of these attempts as being "woefully inadequate." *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1501 (9th Cir. 1991).

The post-conviction petition alleged, *inter alia*, that Mr. Tamayo-Reyes' plea was not knowing and voluntary. He claimed that because the interpreter used by the court did not translate properly, he did not know that he was agreeing to a finding of guilt of manslaughter, that he was waiving important constitutional and trial rights, and that no trial would take place J.A. 16-17.[6]

The state post-conviction judge was presented with affidavits and a deposition from the interpreter, brief testimony from Mr. Tamayo-Reyes and argument by counsel.

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[6] The state argues that the Ninth Circuit held that Mr. Tamayo-Reyes abandoned "the last two claims" in his amended petition for post conviction relief. Pet. br. at 5 fn 4. Mr. Tamayo-Reyes does not agree with that statement. The second claim in the amended petition for post-conviction relief alleged that Mr. Tamayo-Reyes received ineffective assistance of counsel simply because he and counsel spoke different languages. That claim has not been pursued. The third claim, however, was compound. In it Mr. Tamayo-Reyes alleged that: a. he was denied effective assistance of counsel because the interpreter did not accurately translate the communications between himself and counsel; b. the improper translation resulted in his failing to understand that the charge was being reduced only because he was pleading guilty; c. further, he did not understand that he was giving up certain constitutional and trial rights. J.A. 16-17. Counsel for Mr. Tamayo-Reyes in the state post-conviction proceeding argued that the conviction should be set aside as a result of the improper translation of manslaughter (J.A. 43, 44) and trial rights (J.A. 46) independent of any claim of ineffective assistance of counsel. The state post-conviction court understood that the claims of improper interpretation and effective representation were distinct and made findings of fact on each. J.A. 51. Judge Trott, writing for the Ninth Circuit, also understood the claims to be distinct. The opinion states: "We treat the *ineffective assistance of counsel* claims as abandoned." *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1494 n.2 (9th Cir. 1991) (emphasis added). The court addressed the merits of the sufficiency and effect of the interpretation of the distinction between murder and manslaughter *and* the adequacy of the translation of the plea form and plea proceeding. *Id.* at 1498-1500 and 1495. It is only the articulation of the claim as a Sixth Amendment violation that can be considered abandoned.

No expert was called to inform the court of the meaning of the Spanish words used by the interpreter or to properly translate the critical English words. The attorney did not even bring a Spanish dictionary to the court.

Mr. Tamayo-Reyes' testimony in the state post-conviction trial shows, in the inarticulate language one might expect from a person with little education and sophistication with legal issues, that he did not understand that he participated in a proceeding that resulted in a reduction of his charges from murder to manslaughter and a finding of guilt. He testified that when he made appearances in court, "I didn't understood the interpreter when he was explaining me what was happening." J.A. 39. Mr. Tamayo-Reyes signed the plea petition "because he told me there was going to have a court with all the people." J.A. 40. He wanted the witnesses to come to court "[b]ecause they were saying the truth and how the case happened." J.A. 40. Mr. Tamayo-Reyes only learned that there would be no trial after he was sentenced. J.A. 41.

The deposition of the person used as an interpreter revealed that he is an attorney by training and that he had been used "a couple of times' when somebody was needed "real quickly." J.A. 22. The post-conviction court had the transcript of the plea proceeding in which Mr. Sanchez had testified that he neither read nor wrote Spanish. J.A. 3, 36.[7] Mr. Sanchez admitted that he did not conduct a simultaneous translation, that he would "just tell him what's happening." J.A. 30.[8]

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[7] In his deposition Mr. Sanchez testified that he does not often read Spanish, does not do so unless he absolutely has to, and that it "has to be very slow." J.A. 28.

[8] The method of interpretation utilized does not comply with either professional norms or standards established by other jurisdictions that have considered the issue. *See, e.g.*, 28 U.S.C. § 1827(k) (1988) ("The interpretation . . . shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States. . . ."); *Criminal Law*, *supra* note 1 (noting that "simultaneous interpretation" should be utilized in criminal proceedings in Oregon); Administrative Hearing and Court Interpreter Division, *Cal. State Personnel Board Qualifying Examination for Spanish Information and Application Packet* at 1 (1991) ("Administrative Hearing and Court Interpreters provide consecutive and simultaneous interpreting services. . . ."); University of Arizona Federal Court Interpreter Certification Project, Administrative Office of the United States Courts, *Federal Court Interpreter Certification Examination Manual* at 5 (1990) ("A court interpreter must not only possess excellent bilingual skills but also must have the ability to synthesize these linguistic skills and to orchestrate them with superior interpreting techniques in the simultaneous, consecutive, and sight translation modes.").

Post-conviction counsel atempted to have Mr. Sanchez explain to the court how he had translated several of the critical legal concepts for Mr. Tamayo-Reyes. While the effort was woefully inadequate, the few questions that were asked and answered reveal that Mr. Tamayo-Reyes was not properly informed. Mr. Sanchez stated, in English, that he translated "murder" as "that he had killed somebody without the right to do so." J.A. 26. The Spanish words which he used are spelled out in the record as "matador quested mato persona permysso dercheo paramat." J.A. 26-27. These letters, if they even form words, are gibberish. J.A. 62. Regarding his interpretation of the term "manslaughter," Mr. Sanchez testified in English that he said "that it was less than murder." J.A. 27. This does not convey the legal difference among the degrees of homicide.[9]

In all other instances, Mr. Sanchez's interpreting effort was not even substantially correct. Mr. Sanchez translated "knowing or knowingly" as "el savia lo que estava esando." J.A. 27. While these words were spelled into the record in Spanish, they were not translated into English so that the post-conviction court could attempt to as-

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[9] The spanish words used by the interpreter were "era menos." J.A. 27.

sess the adequacy of the interpreting provided Mr. Tamayo-Reyes.[10]

Finally, when asked how he interpreted the terms "indifferent" or "indifference," critical portions of the mental state element of manslaughter in the first degree, Mr. Sanchez could not answer. J.A. 27. Given the previous inaccuracies in interpretation, one can only imagine what Mr. Sanchez actually told Mr. Tamayo-Reyes with respect to such terms. No other evidence was offered.

In arguing the case for Mr. Tamayo-Reyes, post-conviction counsel attempted to evaluate the translation based on his own knowledge of Spanish. His efforts were, however, cut off, and he only commented on the Spanish words which were actually translated into English by Mr. Sanchez. J.A. 43-44. The state post-conviction court apparently relied on Mr. Sanchez's assertion that he had correctly interpreted for Mr. Tamayo-Reyes and denied relief.

After Mr. Tamayo-Reyes had exhausted his state remedies, he filed a petition for a writ of habeas corpus in

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[10] In fact, the phrase could not have been translated into English at all. The words "estava" and "esando" do not appear in a Spanish dictionary. The word "savia" does exist and it translates into English as "sap of a plant," "energy," or "vitality." The professional interpreter hired by Mr. Tamayo-Reyes in the Federal Court offered a translation which was based on the assumption that "permysso" was intended to be "Permiso" and that "dercheo" was intended to be "derecho." J.A. 62. Even with those assumptions, the translations did not make sense. Reference to a Spanish/English dictionary reveals that the majority of the words spelled out do not exist. *See generally, Cassell's Spanish Dictionary* (1968 ed.). In its present form, it is not possible to translate that phrase into English. Even making the various assumptions above does not render the sentence at all comprehensible. Assuming Mr. Sanchez was attempting to say something to the effect of "he knew what he was doing," the proper Spanish translation by reference to a standard Spanish/English dictionary would have been "él sabía lo que estaba haciendo."

Spanish/English dictionaries utilized were *Cassell's Spanish Dictionary* (1968 ed.) and Simon and Schuster's *International Dictionary of Spanish to English and English to Spanish* (1973 ed.).

federal court. The federal court was provided with transcripts of the relevant state proceedings and the state moved for summary judgment. Mr. Tamayo-Reyes opposed that motion and requested an evidentiary hearing, arguing that the state proceeding was not full and fair, and that the material facts were not adequately developed in the state court. He also argued that the presumption of correctness in 28 U.S.C. § 2254(d) should not apply. In support of his request, Mr. Tamayo-Reyes submitted an affidavit from a professional Spanish language interpreter. As discussed above, her affidavit revealed some of the gross inadequacies in the interpretation in the state court. The District Court denied Mr. Tamayo-Reyes' request for an evidentiary hearing and granted the state's motion for summary judgment. The Ninth Circuit reversed and this proceeding ensued.

SUMMARY OF ARGUMENT

Habeas corpus serves a function outside the trial-appellate continuum. These collateral proceedings are not appeals requiring decision on an existing record. Rather, habeas corpus calls for the judiciary to exercise its sound discretion to consider all facts which have a rational bearing on the issues presented. While infrequently used, the availability of fact development proceedings is an integral part of habeas corpus. Application of a rule which would further limit such hearings is antithetical to the purposes and history of the writ.

The state posits the question before this Court as which of two tests to apply. Their position assumes that what occurred in this case can be considered a procedural default. Proper resolution of the issues presented requires a broader analysis and understanding of the nature of habeas corpus.

Congress and the courts have provided significant protection to state interests in the fact development process. These protections are found in three distinct doctrines:

exhaustion of state remedies, the requirements set forth in *Townsend v. Sain*, 372 U.S. 293 (1963) and the presumption of correctness contained in 28 U.S.C. § 2254(d).

The judiciary is not empowered to superimpose a cause and prejudice standard because Congress has acted in this area on several occasions subsequent to the decision in *Townsend*. The rules of statutory construction require the Court to assume that Congress was aware of and incorporated the standard set out in that case when it amended 28 U.S.C. § 2254 in 1966 and adopted the Rules Governing § 2254 cases in the United States District Courts in 1976. The state's reliance on *McCleskey v. Zant*, 113 L.Ed.2d 517 (1991), is misplaced.

The policies underlying the "cause and prejudice" standard are inapplicable to the question of the scope of evidentiary hearings in federal habeas corpus actions. That test was devised to determine when a state prisoner would be precluded from pursuing claims in federal court after violating a state's procedural rules, not the adequacy of a factual record. The issues presented in this case do not involve the failure to observe state procedural rules. The question framed by petitioner misstates the issues actually present in this case.

The weight of the federal and state interests at stake in this case militate against application of the cause and prejudice standard. Once the federal courthouse door has opened and the legality of a prisoner's detention is under consideration, the interests of the federal courts and the integrity of their processes should be accorded greater weight than the interests of the state.

The rule proposed by the state would preclude hearings in most habeas corpus cases. Any fact worth adducing in a federal hearing is "material." If it has been presented in the state proceedings, no federal hearing is necessary. If it has not, the state would require a showing of cause before it can be presented. While the cause standard is

generally difficult to meet, in many post-conviction cases it may be virtually impossible.

The cause and prejudice standard is not needed in this area because very few hearings are held in federal habeas corpus actions. Those hearings which are held are important. No need exists for a rule further limiting federal habeas corpus hearings.

Mr. Tamayo-Reyes fairly presented his claims to the state court. He satisfied the requirements of exhaustion, *Townsend*, and 28 U.S.C. § 2254(d). An evidentiary hearing is necessary to consider the issues of fundamental fairness at stake in this case.

ARGUMENT

I. FACT DEVELOPMENT PROCEEDINGS ARE AN INTEGRAL PART OF THE HABEAS CORPUS PROCESS.

Introduction

Mr. Tamayo-Reyes is asking the federal courts for access to basic courtroom procedures. He is not urging the federal court to intervene in or circumvent ongoing state proceedings or forgive violations of state rules. He is asking the federal court to do something which it has the power to do in all cases—take evidence—and which this Court has said is *mandatory* in some circumstances and discretionary in all others. *Townsend* at 312.

A. Background.

The powers and obligations of the federal courts in considering habeas corpus petitions are broad, extending to all procedural devices necessary to ensure fair consideration of the issues presented. The federal courts may, in their discretion, limit their inquiry to review of state court records if that will suffice. If not, there can be no question but that they are obligated to look beyond those records.

Habeas corpus is a vehicle to challenge the legality of a prisoner's confinement which exists outside the trial-appellate continuum of a criminal case. It is a separate civil action. *Riddle v. Dyche*, 262 U.S. 333, 335-36 (1923).

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings. . . .

Ex Parte Tom Tong, 108 U.S. 556, 559 (1883).[11]

B. The Statutory Scheme Supports an Evidentiary Hearing in this Case.

Congress has made the availability of fact development central to the function of the writ. The need for federal

[11] The writ of habeas corpus holds an honored position in our jurisprudence. *Engle v. Isaac*, 456 U.S. 107 (1982). It stands as a "bulwark against convictions that violate fundamental fairness." *Id.* 126. The great writ comes to us from antiquity, its roots tracing back at least to Magna Carta. Yackle, *Post-Conviction Remedies* 4 (1981). The writ of habeas corpus was imported to the colonies from England and given prominence in Article I, § 9, cl. 2 of the Federal Constitution and subsequently the constitution of every state. *Id.* at 13.

Habeas corpus has been called "the most celebrated writ in English law." 3 William Blackstone, *Commentaries on the Law of England*, ch. 8 at 129 (1st ed. reprint 1966). The writ is not simply a legal tool to challenge confinement. Its "history is inextricably intertwined with the growth of the fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 401 (1963). As noted in *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972):

> There can be no doubt that in enacting § 2254, Congress sought to "interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action."

hearings was recognized in the Judiciary Act of 1789. Ch. 20, § 14, 1 Stat. 81 (1789). Section 14 of the Act of 1789 provides in pertinent part:

> Sec. 14. That all the . . . courts of the United States, shall have power to issue writs of . . . *habeas corpus*. . . . And that either of the justices of the supreme court, as well as judges of the district courts, shall have the power to grant writs of *habeas corpus for the purpose of an inquiry* into the cause of the commitment.—Provided, That writs of habeas corpus shall in no case extend to prisoners in goal, unless they are in custody, under colour of the authority of the United States, or are committed for trial before the some court of the same, or are necessary to be brought to court to testify. (emphasis added).

The Habeas Corpus Act of 1867 specifically provided for evidentiary hearings. 14 Stat. 385 (1867). After a determination was made that a habeas corpus petition had merit, the presiding judge was to issue the writ and require the petitioner's custodian to bring the petitioner before the court and "certify the true cause of [petitioner's] detention." 14 Stat. 386. At that time, the petitioner in open court could deny the allegations in the custodian's return. *Id.*; *see also* Charles D. Weisselberg, *Evidentiary hearings in Federal Habeas Corpus Cases*, 1990 B.Y U. L.Rev. 131, 139 n.38.

The habeas corpus provisions of the federal code were revised to RS 761 (1873) and later recodified at 28 U.S.C. § 461 (1940 ed.). The Judicial Code and Judiciary Act of 1948, 62 Stat. 869 (1948), recodified and reworded § 461 into 28 U.S.C. § 2243. That section provided that "the Court shall hear and determine the facts and dispose of the matter as law and justice require." That section has not been subsequently amended.

The legislative scheme as it exists today is highly focussed on fact-finding processes in federal court. 28

U.S.C. §§ 2241-42 set out the power to grant the writ and the nature of the application. Section 2243 establishes a show cause procedure. That section of the statute allows both the applicant and respondent to controvert facts. The statute then directs the court to "summarily hear and determine the facts. . . ." Section 2244 defines the finality of prior determinations on issues raised in a prior habeas petition. It assumes, however, that evidentiary hearings will be held: "(b) . . . [A]fter an evidentiary hearing on the merits of a material factual issue. . . ." Section 2245 addresses the evidentiary question of admissibility "on the hearing of an application for a writ" of a certificate of the judge who presided over the trial. Section 2246 provides that "evidence may be taken orally or . . . by deposition, or by affidavits." Section 2247 provides for the admissibility of certain documentary evidence. Section 2248 establishes a rule of "conclusiveness" of the allegations in a return which are not traversed "except to the extent that the judge finds from the evidence that they are not true." Sections 2249 and 2250 provide for presentation of documents and money for an indigent prisoner to obtain various documents. Sections 2252 and 2253 address issues of notice and appeal. Section 2254(d) assumes that evidentiary hearings will be held in habeas actions and establishes detailed evidentiary rules for those hearings.

The Rules Governing Section 2254 Cases in the United States District Courts, adopted by this Court and approved by Congress, further evidence Congress' intention regarding evidentiary hearings in the habeas corpus process. The Rules provide for different levels of consideration depending on the issues and facts alleged. The procedures allow for preliminary review and summary disposition of a petition if it plainly appears to lack merit. *See* 28 U.S.C. foll. § 2254, Rule 4. If such summary dismissal is not appropriate, the state may be required to answer. Rule 5. If the initial pleadings suggest that

evidentiary disputes exist, "the processes of discovery available under the Federal Rules of Civil Procedure" may be employed. Rule 6. If the district court needs additional facts, they may be presented in the form of documents and affidavits. Rule 7.[12] If expansion of the record is an insufficient vehicle for resolving disputed facts, a hearing with live witnesses shall be held in the discretion of the court. Rule 8.

C. The Caselaw Supports the Decision of the Ninth Circuit in Requiring an Evidentiary Hearing in this Case.

The decisions of the Court for more than 100 years reflect the integral role of federal fact-finding processes in resolution of habeas corpus petitions. They further reveal the Court's understanding that Congress' intent in the various Habeas Corpus Acts has been unwavering. As stated in *Brown v. Allen*, 344 U.S. 443, 462-464 (1953):

> A federal judge on a habeas corpus application is required to "summarily hear and determine the facts, and dispose of the matter as law and justice require," 28 U.S.C. § 2243. This has long been the law.
>
> . . .
>
> However, a trial may be had in the discretion of the federal court or judge hearing the new application.

The *Brown* Court's comment "[t]his has long been the law," 344 U.S. at 462, referred back at least to 1867. As noted in *Walker v. Johnston*, 312 U.S. 275 (1941):

> The Court or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments . . . 'in other circuits, if an issue of facts is presented, the practice appears to have been to issue the writ, have the petition produced, and hold a hearing at which evidence is re-

[12] The state's argument would, if accepted, equally limit the use of Rule 7 expansion of the record.

> ceived. This is, we think, the only admissible procedure [under] the Habeas Corpus Act of 1867.

Id. at 285.

Twenty years earlier in *Moore v. Dempsey*, 261 U.S. 86, 92 (1923), the Court described the process as follows:

> We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts for himself, when, if true, as alleged, they make the trial absolutely void. . . . We will not say that they cannot be met, but it appears to us unavoidable that the district judge should find whether the facts alleged are true, and whether they can be explained so far as to leave the state proceedings undisturbed.

See Ex Parte Cuddy, 131 U.S. 280, 286 (1889) ("We do not mean to say that this presumption may not be overcome by evidence. . . . [I]f the appellant had alleged such facts . . . he would have been entitled to the writ, and, upon proving such facts, to have been discharged."); *Frank v. Mangum*, 237 U.S. 309, 331-332 (1915) ("a prisoner . . . may have a judicial inquiry into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction . . . to inquire into jurisdictional facts, whether they appear on the record or not"); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) ("The petitioner had full opportunity to offer proof of it at the hearing on the first petition. . . ."); *Hawk v. Olson*, 326 U.S. 271, 274-275 (1945) ("Since *Frank v. Mangum*, this Court has recognized that habeas corpus . . . is a proper procedure . . . even though the events . . . did not appear upon the face of the record. . . . The legislation enlarged for the federal courts the 'bare legal review of the authority under which a petitioner was held. . . .'"); *Townsend v. Sain*, at 311 ("the whole history of the writ—its unique development

—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of the courts of appeallate review").

D. Conclusion.

The approach to habeas corpus advanced by the state is antithetical to the nature and purposes of the writ. The state seeks to redefine the writ as something more closely related to an appellate process than its function and history allow. The state simply ignores the repeated enactments by Congress and statements by this Court about the critical role which fact-finding procedures play in habeas corpus cases.

The state's efforts to redefine the writ are grounded in references to the importance of finality, federalism and comity. The effect of the state's position is to skew state/federal relations in a manner that demeans the powers of the federal courts.

II. CONGRESS AND THE COURTS HAVE CAREFULLY PROTECTED STATE INTERESTS IN THE FACT DEVELOPMENT PROCESS.

State interests in the fact development process in federal habeas corpus are protected by three distinct but related doctrines. These are the requirement of exhaustion of state remedies, the standard set out in *Townsend*, and the presumption of correctness.

A. The Exhaustion Doctrine.

The exhaustion doctrine is presently codified in 28 U.S.C. § 2254(b), which provides in part:

> An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . .

At least since 1886 and the decision in *Ex Parte Royall*, 117 U.S. 241 (1886), the Court has employed the ex-

haustion doctrine to protect the states' federalism interests in determining whether a petitioner should be permitted to proceed in federal court on a habeas corpus petition.

The federal courts and Congress have concluded that proper respect for the states' role in our federal system requires that the federal courts allow the states the first opportunity to correct constitutional violations. *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

The exhaustion requirement is only met when the federal claims are "fairly presented" in the state forum. *Picard*, *supra*. The Court has most often defined "fairly presented" by explaining what is not permissible. A claim has been fairly presented in state court when additional facts are adduced in a habeas hearing unless the new evidence "fundamentally alters the legal claim." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The Court noted in *Picard* that variations in legal theory or "factual allegations" do not render a claim unexhausted as long as the essence of the claim was presented. *Picard*, 404 U.S. at 277.

Reformulation of claims is permissible unless the claims are "clearly distinct" from the claims presented in state court. Then, the exhaustion requirement has not been met. *See Humphrey v. Cady*, 405 U.S. 504, 517 n.18 (1972). An entire body of law has been developed regarding the exhaustion doctrine to meet the respective state and federal interests. *See, e.g., Rose v. Lundy*, 455 U.S. 509 (1982) (mixed petitions must be dismissed); *Wilwording v. Swenson*, 404 U.S. 249 (1971) (repetitive state proceedings need not be pursued); *Smith v. Digmon*, 434 U.S. 332 (1978) (exhaustion satisfied even if state does not rule on properly presented claim); *Nix v. Whiteside*, 475 U.S. 157 n.3 (1986) (claim reformulated but further proceedings would be futile); *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (*en banc*), *cert. denied*, 464 U.S. 9048 (1984).

Vasquez v. Hillery, *supra*, and *McCleskey v. Kemp*, 481 U.S. 279 (1987), illustrate the proper balance of federal/state interests. Vasquez had a hearing in the state court at which evidence on his discrimination claim was adduced. In federal court he introduced further evidence regarding discrimination in the grand jury process. He also offered expert testimony in the form of a computer analysis of the probability that chance would have accounted for the exclusion of blacks from the grand jury. 474 U.S. at 258-259. The claim was not reformulated or "fundamentally altered." The Court stated:

> Form would indeed triumph over substance were we to allow the question of exhaustion to turn on whether a federal judge has relied on educated conjecture or has sought out a more sophisticated interpretive aid to accomplish the same objective.

474 U.S. at 260. The Court approved the holding of the hearing. *Id.*

In the Georgia courts McCleskey had submitted an affidavit of one William J. Bowers, a sociologist and author of a study of the administration of the death penalty in Georgia.[13] In the district court McCleskey proffered a sophisticated statistical study by Professors Baldus, Pulanski and Woodworth. The new and comprehensive evidence was accepted and considered by the federal courts. The decision of this Court does not contain any discussion about the propriety of review or suggestion that the evidence could not be considered because he had defaulted on the claim or failed to exhaust his state remedies.

The protections afforded state interests by the exhaustion doctrine as exemplified in *Vasquez* and *McCleskey v. Kemp* are strong. A petitioner may only get into the

[13] The facts about the state proceeding are found in the Order of the Superior Court of Butts County on case number 4909, dated April 8, 1981.

federal court if he has fairly presented his claims. If not, the federal courts are to summarily dismiss the petition under 28 U.S.C. §§ 2243 and 2254(b) for failure to exhaust.

B. The *Townsend* Holding.

Once the door to the courthouse is open, *Townsend* provides the second line of deference to state interests. Evidentiary hearings need not be held if "the state court trier of fact has after a full hearing reliably found the relevant facts." 372 U.S. at 312-313. A hearing is mandatory only if any one of six circumstances exist:

> 1) the merits of the factual dispute were not resolved in the state hearing; 2) the state factual determination is not fairly supported by the record as a whole; 3) the fact-finding procedure employed the state court was not adequate to afford a full and fair hearing; 4) there is a substantial allegation of newly discovered evidence; 5) the material facts were not adequately developed at the state court hearing; or 6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. In other circumstances, the federal courts retain the discretion to order an evidentiary hearing. *Id.* at 318.

The *Townsend* Court recognized that adducing additional facts in federal court under the fifth category should not be permitted lightly. As a result, the Court held that a petitioner could only do so if he had not deliberately bypassed the state proceedings.

The discussion in *Townsend* about deliberate bypass suggests that the Court was importing a concept of responsibility into the definition of "adequate" in the fifth circumstance described in that opinion. That concept directs the Court to ask why facts were not adequately developed. *Townsend* provided the framework for answering that question with the deliberate bypass test which ensures that the federal courts will not unduly interfere in state proceedings.

C. § 2254(d)—The Presumption of Correctness.

Once a federal habeas corpus petitioner convinces the federal court that he has given the state a fair opportunity to rule on his claims, has not deliberately bypassed the state, and has commenced the federal hearing, he must still operate under the evidentiary presumption of correctness erected in 28 U.S.C. § 2254(d). That section provides that in a federal habeas hearing "a determination after a hearing on the merits of a factual issue" by a state court "shall be presumed to be correct" unless one of eight factors is present. If the presumption of correctness is applicable, the habeas petitioner in an evidentiary hearing bears the burden of establishing "by convincing evidence that the factual determination . . . was erroneous."

Section 2254(d) was specifically intended by Congress to address the federalism, comity, and finality concerns of the states. The Court has understood § 2254(d) to be a successful codification of the applicable federalism concepts. *See Sumner v. Mata*, I, 449 U.S. 539 (1981) and *Sumner v. Mata*, II, 455 U.S. 591 (1982).

Section 2254(d) is a distinct rule which governs the standard of proof in a federal habeas hearing. *See* Weisselberg, *supra* at 154-55. The rule requires the federal courts, even when a petitioner has shown proper respect for state proceedings, to presume that factual findings made in the state courts are correct. The rule does not preclude evidentiary hearings or limit their scope.

Since 1966 this Court has consistently followed § 2254(d), going so far as to insist that lower courts cite the particular subsection of that provision which applies when they proceed to rely on fact findings other

than those made by the state courts. In *Sumner v. Mata*, I, the Court stated:

> When it enacted the 1966 amendment to 28 U.S.C. § 2254, [28 U.S.C. § 2254] Congress specified that in the absence of the . . . factors [enumerated in subsections (d)(1)-(8)] the burden shall rest on the habeas petitioner . . . to establish 'by convincing evidence that the factual determination of the state court was erroneous . . . [W]e now hold that a habeas corpus court should include in its opinion granting the writ the reasoning which lead it to conclude that any of the seven [eight] factors was present . . . .

449 U.S. at 551-52. *Accord Sumner v. Mata*, II 455 U.S. 591, 593 (1982).

The language in § 2254(d)(3) is identical to the language in the fifth subsection of *Townsend*, 372 U.S. at 313. Congress recognized that it is appropriate to dispense with the presumption of correctness when "the material facts were not adequately developed at the state court hearing." 28 U.S.C. § 2254(d)(3). As a result, the state's argument would logically apply the cause and prejudice standard to both the question of when an evidentiary hearing is to be held and the question of when the presumption of correctness can be overcome.[14]

D. Conclusion.

The state ignores the strong protection to state interests provided in the habeas corpus law. They ignore the existing rules which limit when fact development may take place in habeas corpus proceedings.

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[14] The court has, at times, called § 2254(d) a codification of *Townsend*. *See, Brewer v. Williams*, 430 U.S. 387, 395 (1977). At other times, the distinction in function has been noted. *See LaVallee v. Delle Rose*, 410 U.S. 690, 694 (1973) (Marshall, J. dissenting).

III. CONGRESS HAS ADOPTED THE STANDARD SET OUT IN *TOWNSEND*.

Introduction

Townsend was decided in 1963. On two occasions since then Congress has acted in the area of habeas corpus hearings. The rules of statutory construction compel the conclusion that Congress has ratified the *Townsend* standard. The state's argument that Congress has not adopted the *Townsend* standard is deficient in several respects. First, they ignore the settled rules of statutory construction. Second, they ignore the scope of the changes made by the 89th Congress. Third, they ignore Congress' actions in 1976. Fourth, they push recent caselaw too far.

A. Congress Is Presumed to Know the Law.

The Court has repeatedly held in a variety of contexts that Congress is presumed to know the law, be aware of existing decisions, and accept judicial interpretations unless it specifically states to the contrary. *See, e.g., Miles v. Apex Marine Corps*, 112 L.Ed.2d 274, 290-291 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *McNary v. Haitian Refugee Center, Inc.*, 112 L.Ed.2d 1005, 1020 (1991).

Midlantic Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), arose in a context which has particular relevance to the issue in this case. The question before the Court, whether § 554(a) of the Bankruptcy Code, 11 U.S.C. § 554(a), authorized a trustee to abandon property in certain situations, required analysis of the relationship between statutes and caselaw. The Court stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

474 U.S. at 501. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

B. The Relationship Between *Townsend* and 28 U.S.C. 2241-54.

The *Townsend* standard was enunciated in 1963. In 1966 Congress acted in a related area of habeas corpus law when it enacted 28 U.S.C. § 2254(d). While its purpose was to promote the interests of the states in finality,[15] the analysis cannot stop there, but must continue to an examination of the full course Congress pursued. Congress did not overrule *Townsend*. Nor did it seek to limit the circumstances in which a habeas petitioner should be granted a hearing. Instead, Congress legislated a presumption of correctness to be applied *in* evidentiary hearings.

Not only does Congress' action presume that hearings will take place, it adapted the standard set out in *Townsend* to the question of how the hearings should proceed. The language in § 2254(d)(3) is *identical* to that in subsection (5) in *Townsend*. The presumption that Congress knows the law is empirically supported here by use of the identical language. This case is stronger than *Cannon, supra*. The state's effort to jettison the deliberate bypass standard cannot be squared with Congress' passage of § 2254(d). *See Goodyear Atomic Corp. v. Miller, supra*.

The 1966 amendments to the habeas corpus act were not limited to § 2254(d). Congress also amended § 2241 to provide jurisdiction over habeas proceedings to district courts both in the district in which a petitioner is held and the district in which the conviction occurred.[16] The Senate report which accompanied the legislation underscores Congress' understanding of the importance of hearings in habeas cases and the impact of this Court's then, recent decisions:

> As a result of recent Supreme Court decisions . . . the scope of inquiry in hearings has been greatly expanded. Questions of fact now reviewable may require the testimony of witnesses and the introduction of other evidence.

S. Rep. 1502, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2968, 2969. In amending § 2241 Congress not only expressed its awareness of the recent developments in the caselaw, but acted to *accommodate* them through a jurisdictional amendment to bring more efficiency to the hearing process. The action provides clear proof of Congress' adoption of the hearings standards.[17]

Action on the 1977 amendments to the Rules Governing § 2254 Proceedings in the United States District Courts provides further support for the argument that Congress has approved *Townsend*. Those amendments detailed the hearings process and described several different fact finding procedures. The Advisory Committee notes to Rules 7 and 8 are replete with references to the necessity for hearings and passages from *Townsend*. The Rules were approved by Congress. Pub. L. No. 94-349, 90 Stat. 822 (1976); Pub. L. No. 94-426, 90 Stat. 1334 (1976).

The principles of statutory construction require that the Court presume that our legislators are aware of the relevant law. Imposition of the cause and prejudice standard to limit federal hearings is contrary to Congress' intent and action.

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[15] See S. Rep. No. 1797, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 3663, 3663-4.

[16] Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811.

[17] The Court was faced with a similar question of statutory interpretation in *Brown v. Allen*, 344 U.S. 443 (1953). The question there was whether the 1948 amendments to 28 U.S.C. § 2241-54 had eliminated the right of a state prisoner to apply for federal habeas corpus relief. In rejecting that position, the Court looked to the entire statutory scheme:

> The suggested elimination of district and circuit courts does not square with the other statutory habeas corpus provisions. *See* 28 U.S.C. §§ 2241, 2242, 2251, 2252, 2253, 3d paragraph. We are unwilling to conclude without a definite Congressional direction that so radical a change was intended.

344 U.S. at 450.

1. *The state's reliance on H.R. Rep. No. 1384, 88th Cong., 2d Sess. (1964), is misplaced.*

The state argues that the legislative history as set out in H.R. Rep. No. 1384 shows Congress' antipathy to habeas corpus hearings. We respectfully submit that petitioner is incorrect.

The state calls the bill passed in 1966 "substantially similar" to that proposed in 1964. Pet. br. at 19, fn. 11. One significant difference exists. Section 2254(e) as proposed in 1964 contained seven exceptions to the presumption of correctness. Omitted was the "catch-all" eighth subsection in the 1966 law which permits the federal courts to review the entire record and conclude that factual determinations are not fairly supported. H.R. Rep. No. 1384 at 2-3. Between 1964 and 1966, therefore, Congress *expanded* the number of situations in which the presumption of correctness would not apply.

In 1964 Congress considered the amendments to § 2244 which were adopted in slightly different form two years later. Congress did not then, nor in 1966, consider a section on "finality of determination" which would have given preclusive effect to prior legal or factual determinations of state courts as it did for prior determinations by federal judges. Instead, Congress adopted the evidentiary rule found in § 2254(d).

H.R. Rep. No. 1384 also contains an extensive discussion of efforts made in Congress to severely restrict habeas corpus. Review of that discussion reveals that proposals quite similar to that sought here by the state were introduced in Congress and rejected.

A 1954 proposal would have permitted the federal courts to "entertain" habeas petitions only if the issue had not previously been raised and determined, there was no fair and adequate opportunity to do so *and* no remedies were available in the state court. H.R. Rep. No. 1384 at 16. A similar bill was introduced and died in the 86th Congress. *Id.* at 17. In the 86th Congress an effort was made, at the behest of various state attorneys general, to amend § 2254(b) to permit discharge of state prisoners only by a three-judge federal court. *Id.* at 21. This proposal was based on the belief that permitting one federal judge to release a state prisoner denigrated the state proceedings. *Id.* at 22. This too was defeated.

In discussing why the restrictive bills were not reintroduced in 1964, Congress' true understanding of the importance of habeas corpus hearings was revealed:

> We come now to the second proposed amendment. If the bill is reintroduced, we feel reasonably certain an amendment with respect to the effect to be given to State court factual determinations, where the same factual issue arises in a proceeding instituted in a federal court by an application for a writ of habeas corpus by a state court prisoner, will be offered by the State organizations referred to above.
>
> . . .
>
> Of course, an amendment such as was proposed to our committee by the representatives of such State organizations . . . would be wholly incompatible with the duty of Federal courts to determine federal constitutional questions. However, your Committee is of the opinion that a provision in the proposed statute dealing with the questions of presumption and burden of proof would be both practical and desirable.

Id. at 23.[18] This Court should not judicially legislate what Congress has repeatedly refused to enact.

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[18] The discussion which followed in the report referred to a number of cases which included passages about the importance of habeas corpus and federal hearings. *Id.* at 24-25. The state's reference to several passages from *Brown v. Allen* does not convey the tenor of the committee's report. The first quote from *Brown* which appears at page 19 of the state's brief is incomplete. The committee report continued:

> In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last

The conclusion of the report is not what the state argues (Pet. br. at 19), but rather, a discussion of the evidentiary rule which eventually was enacted in 28 U.S.C. § 2254(d). This conclusion reveals that the committee clearly understood that it was not in any manner limiting the right to habeas hearings. The sole issue with which the committee dealt was the evidentiary question of "the weight to be given" state court factual determinations. It was "obvious" to the committee that no presumption of correctness should apply in the seven areas included in the proposed bill, including the situation in which material facts were not adequately developed in the state hearing. H.R. Rep. No. 1384 at 25.

2. *The state's reliance on the legislative history discussion in McCleskey v. Zant is misplaced.*

The state argues that adoption of the cause and prejudice standard in the abuse of the writ area last term in *McCleskey v. Zant*, 113 L.Ed.2d 517 (1991), supports adoption of that standard here. We respectfully submit to the contrary that the Court's reasoning in *McCleskey v. Zant* provides further support for Mr. Tamayo-Reyes' analysis.

The decision was based on the similarity in the concerns addressed by the procedural default doctrine and those addressed in the rules barring successive habeas petitions.

> This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas.

113 L.Ed.2d at 542. No parallel to procedural default exists here.

Critical to the analysis in this case is the conclusion of the Court in *McCleskey v. Zant*, that application of the

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resort of another jurisdiction on federal constitutional issues. It is not *res judicata*.

H.R. Rep. No. 1384 at 25.

cause and prejudice standard did not mark a significant break from prior law. Rather, the Court concluded that the cause and prejudice standard was "consistent" with decisions which predated *Fay v. Noia*, 372 U.S. 391 (1963) and the 1948 Amendments to 28 U.S.C. § 2244. *Id.* at 545. In contrast, as the state recognizes throughout its brief, application of the cause and prejudice standard in this case would require the Court to repudiate the long standing law regarding the right to a hearing.

McCleskey v. Zant is inapplicable for yet another reason. The Court has taken the lead on the successive petition/abuse of the writ aspect of habeas corpus procedure. As noted in *McCleskey v. Zant*, Congress first addressed the issue of repetitive habeas corpus petitions in 1948. 113 L.Ed.2d at 537. Congress' action followed a long series of decisions by this Court which had first established the doctrine. In contrast, Congress has taken the lead role in defining when hearings should be held in habeas corpus actions.

When Congress addressed the question of successive petitions and abuse of the writ in 1948, it did not intend to disrupt the judicial evolution of habeas principles. *Id.* 113 L.Ed.2d at 538. *See* Revisor's Note to 28 U.S.C. § 2254 (1948). Indeed, long before *McCleskey v. Zant*, in *Sanders v. United States*, 373 U.S. 1 (1963), the Court noted that Congress' silence on the standard for abuse of the writ was "not intended to foreclose judicial application of the abuse of writ principle as developed in *Wong Doo* and *Price*." *Id.* at 12. The 1966 Amendment to § 2244 similarly "was not intend[ed] . . . to foreclose application of the court announced principles defining and limiting the district court's discretion to entertain abusive petitions." *McCleskey v. Zant*, 113 L.Ed.2d at 540.

The Court's conclusions in *McCleskey v. Zant* regarding the relationship between the Congressional and judicial roles in the area of abuse of the writ were central to that decision. The relationship between the Court and Con-

gress regarding evidentiary hearings is different. Here Congress has taken the leading and preemptive role. *McCleskey v. Zant*'s conclusion, that § 2244(b) did not incorporate a standard which precluded adoption by the Court of the cause and prejudice standard, is inapplicable to the issue before the Court.

IV. THE CAUSE AND PREJUDICE TEST IS INAPPLICABLE TO THE QUESTION OF WHEN AN EVIDENTIARY HEARING SHOULD BE HELD.

The cause and prejudice test was articulated to address concerns regarding state procedural rules which are not present in this case. Application of that test in this situation would be unworkable and would not lead to a uniform rule applicable nationwide. Balancing the federal and state interests in this area weighs against the use of the cause and prejudice standard.

A. The Cause and Prejudice Test is Only Applicable When an Adequate and Independent Ground Exists to Deny Federal Review.

1. *The foundation of the test.*

Cause and prejudice was first fully articulated by the Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977), as the test to determine whether a habeas corpus petitioner's failure to comply with a state's procedural rules should bar federal review. In *Sykes* the Court confronted an aspect of habeas corpus procedure on which Congress had never, and has not, spoken.[19]

The rule had its genesis in the principle of federalism that independent state substantive grounds insulate a state decision from review by a federal court. *See Coleman v. Thompson*, 115 L.Ed.2d 640, 655 (1991); *Murdock v. Memphis*, 87 U.S. 590 (1875); Yackle, *supra* at 305, 331, 336. That doctrine was first applied to an independent procedural ground in *Davis v. United States*, 411 U.S. 233 (1973). There the petitioner had failed to comply with the requirements of Fed. R. Crim. P. 12 (b)(2) which specifically provides that certain defenses "may be raised only on motion before trial . . . and that failure to do so constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." The Court concluded that a petitioner must show not only "cause" for the default, but also "actual prejudice" resulting therefrom. 411 U.S. at 245.

Three years later, in *Francis v. Henderson*, 425 U.S. 536 (1976), the holding in *Davis* was applied to a state habeas corpus petitioner who challenged the composition of his grand jury after failing to make a timely challenge in state court. The decision in *Francis* did not make it clear whether the court was repudiating *Fay*, *supra*, or merely distinguishing it.

The following term, in *Wainwright v. Sykes*, the Court explicitly rejected *Fay*. Cause and prejudice was developed as the standard to be met in order to get through the door of the federal court when a petitioner has violated state *procedural rules* which constitute an adequate and independent ground for action by a state court.

Sykes was concerned with procedural trial level rules. Sykes had failed to object at trial to admission of a confession. He did not raise any claim regarding the confession on his direct appeal. 433 U.S. at 75. The "crux of the case" was described by the Court as:

> Shall the rule of *Francis v. Henderson*, *supra*, barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial?

433 U.S. at 87.

[19] *Sykes* involved the waiver/procedural default aspect of habeas corpus procedure on which the Court has ruled for decades without guidance from Congress. *See, e.g., Brown v. Allen*, 344 U.S. 443 (1953); *Fay v. Noia*, 372 U.S. 391 (1963).

The Court's analysis of the question it had defined focused on the importance of such a procedural rule to the trial of a criminal case. Such rules "may lead to the exclusion of the evidence," promoting finality or acquittal; it may improve the trial process by forcing prosecutors to more fully evaluate their cases; it enables the making of a record with recollections at their freshest; failure to observe such rules detracts from the importance of a "trial" as a "decisive and portentous event." 433 U.S. at 88-91.

Subsequent to *Sykes*, the Court extended the procedural default doctrine beyond the trial stage. The doctrine has, however, continued to be rooted in violations of a state's procedural rules. *See Engle v. Isaac*, 456 U.S. 107, 129 (1982). When a state has established rules whose violation can provide an independent ground to sustain a judgment, principles of federalism and comity are implicated. In the absence of such a violation, the balance is different.

2. *Coleman v. Thompson.*

The most recent decision which discussed the federal/state balance, *Coleman v. Thompson*, 115 L.Ed.2d 640 (1991), further supports the view that cause and prejudice should be limited to procedural default situations. Coleman failed to comply with the Virginia Supreme Court Rule regarding the time for filing a notice of appeal. The Court held that his failure to comply with the Supreme Court Rule constituted an independent state ground for refusal of the federal courts to consider his claims. 115 L.Ed.2d at 663. From the outset the analysis focused on the "respect federal courts owe the States and the States' *procedural rules*. . . ." *Id.* at 654 (emphasis added). The Court noted that certiorari was granted "to resolve several issues concerning the relationship between *state procedural defaults* and federal habeas review. . . ." *Id.* 111 S.Ct. at 2553, 115 L.Ed.2d at 655 (emphasis added).

Coleman reiterated that the basis of the cause and prejudice inquiry is the principle of federalism that an adequate and independent state ground for a state decision should foreclose federal review. *Id.* at 655.

> We have applied the independent and adequate state ground doctrine . . . in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to *meet a state procedural requirement*. In these cases, the state court judgment rests on independent and adequate *state procedural grounds*. (emphasis added)

Id. at 656. Application of the adequate and independent state ground doctrine is important to concerns of comity and federalism, in part because it promotes the states' interests in enforcing their laws. *Id.* at 656.

In *Coleman*, the Court noted the relationship between the adequate and independent state ground doctrine and that of exhaustion. When a procedural default has occurred, a high bar to federal consideration of the defaulted claim is important to ensure that the doctrine of exhaustion is not circumvented. *Id.* at 656-657.

The desirability of restraint in holding hearings by the federal courts diminishes once the exhaustion requirement is met if there has been compliance with other procedural rules. *See Picard.* This standard strikes an appropriate balance between the interests of the states and the responsibilities of the federal courts.

After concluding its analysis of the nature of a state court ruling which will preclude federal review, the *Coleman* opinion turned to the question of the showing a petitioner must make in order to overcome the state's ruling. That discussion provides further support for Mr. Tamayo-Reyes' position.

The analysis refocused on the importance of promoting state procedural rules and the states' efforts to enforce their laws. First, the Court noted that *Fay* dealt with a procedural default. *Sykes*, 115 L.Ed.2d at 665. The opinion then noted that decisions subsequent to *Fay* analyzed factors in the federalism calculus differently and concluded that *Fay's* deliberate bypass test did not provide sufficient deference to the interests of the states. All of the decisions, however, in which the cause and prejudice test were applied, involved situations in which a petitioner had violated a state's rules and committed a procedural default.[20] *Id.* at 666-668.

The conclusion reached by the Court, that the cause and prejudice standard should be applied when a habeas petitioner had entirely lost his right to appeal, was expressly based on the need for the federal courts to respect state procedural rules. *Fay* was rejected because it "was based on a conception of federal/state relations that undervalued the importance of *state procedural rules*." *Sykes*, 115 L.Ed.2d at 669. (emphasis added).[21]

3. *The state pushes its reliance on Brown v. Allen too far.*

The state's argument that *Brown* and *Salinger v. Loisel*, 265 U.S. 224 (1923), recognize that cause and prejudice should apply to both the successive petition question and

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[20] The second decision discussed by the Court in *Coleman, Davis v. United States, supra,* involved violation of a federal procedural rule which included a specific waiver provision. 116 L.Ed.2d at 666.

[21] In this regard it is important to note that in his concurrence in *Wainwright v. Sykes,* Justice White concluded:

> With respect to the necessity to show cause for noncompliance with the state rule, I think the deliberate bypass rule of *Fay v. Noia* affords adequate protection to the state's interest in insisting that defendants not flout the rules of evidence.

433 U.S. at 98 (concurring). While Justice White's definition of cause was not accepted in the *Coleman* situation, it is applicable here.

questions about evidentiary hearings misreads the opinions. (*See* Pet. Br. at 18). When the Court in *Brown* stated: "That principle is also applicable to state prisoners," 344 U.S. at 463, it was not holding that the same standard should apply to the holding of evidentiary hearings and successive petitions. The Court was, rather, noting that in *Salinger* it had held that a petition for writ of habeas corpus filed by a federal prisoner could be denied on the ground that it was a second filing. The passage in *Brown* to which the state refers merely extended that principle to a second federal habeas corpus petition filed by a state prisoner.

This is made clear by the *Brown* Court's reference to *Darr v. Burford*, 339 U.S. 200 (1950) immediately following the paragraph quoted by the state. The pages to which the *Brown* Court referred contain a discussion of the effect of a prior denial of certiorari and conclude:

> All the authorities agree that *res judicata* does not apply to applications for habeas corpus. The courts must be kept open to guard against injustice through judicial error. Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.

339 U.S. at 214-215. Immediately after the reference to *Darr v. Burford*, the *Brown* Court turned to a discussion of when a federal evidentiary hearing should be held. The Court noted that a federal court may decline to hold a hearing if it is satisfied that the state record is adequate:

> However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution.

344 U.S. at 463-464. The Court cited to *Moore v. Dempsey, supra,* and in a footnote a series of cases including *Darr v. Burford, supra,* and *Salinger v. Loisel, supra.*

It should finally be noted that the state fails to mention that in the consolidated *Brown* cases, the federal district courts held several extensive evidentiary hearings. 344 U.S. at 453, 478.

4. *Conclusion.*

The decisions of the Court make it abundantly clear that in the absence of an independent state procedural or substantive ground for a decision, the federalism concerns which motivate the Court to preclude review are diminished. The concerns which lead the Court to replace the *Fay* "deliberate bypass" standard with the *Sykes* "cause and prejudice" standard are not present. *See, e.g., James v. Kentucky*, 466 U.S. 341, 348 (1984); *County Court of Ulster County v. Allen*, 442 U.S. 140, 150-151 (1979).

The state's brief ignores these important distinctions. While permitting a habeas petitioner to adduce facts at a federal hearing does undermine interests in finality (pet. br. at 16), the desire to promote finality is but one factor in the federalism equation. Deference to a state's laws is a separate factor which tips the scales further on the side of deference to state interests. As noted in *Coleman*:

> [f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. . . . These costs are *particularly high* . . . when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims. . . . (emphasis added).

115 L.Ed.2d at 668 (internal quotations omitted).

The state's suggestion that *Townsend* requires that the same standard should be applied when a procedural default occurs and when a petitioner seeks to offer evidence at a habeas hearing ignores some of the developments in the law since *Townsend* was decided. That opinion concluded that the deliberate bypass test provided ade-

quate protection to legitimate state interests. 372 U.S. at 317. It did not hold, as the state suggests, that the two issues must be governed by the same standard.

Since *Townsend*, the Court has developed its analysis of the standards to be employed in the context of default on procedural rules. Its assessment of the state/federal balance has occurred in that context. The analysis has not addressed the different interests at stake when no procedural rule has been violated. Because the interests of the federal and state governments are different when the issue is one of presentation of evidence on a claim which the federal courts are considering, application of a different standard is appropriate.

B. The Federal/State Interests at Stake in this Case.

Much of the habeas corpus caselaw reflects the tension between state and federal interests. That tension has been resolved in favor of the states in a number of decisions in recent years. This case presents a number of factors which were not discussed in the earlier cases, are not discussed in the state's brief, and which weigh on the side of federal evidentiary hearings.

1. *The Integrity of the Federal Judicial Process.*

Questions about the relative weight to be accorded the interests of the states and the federal government arise at several different points in the habeas corpus process. The state's brief ignores the important differences in interests which arise at the different stages.

The question of whether a petitioner should be permitted to proceed if he has not complied with a state's procedural rules arises when he arrives at the federal courthouse. At that point the federal courts must decide whether to open the door. That question properly gives considerable weight to the interests of the states in finality and compliance with their rules. *See, e.g., Wainwright v. Sykes.* Whether to take evidence during a federal hear-

ing raises entirely different questions. At that stage the door is open. As a result, a decision has already been made that the interest in finality has been overcome by the need to consider the petitioner's claims. At this stage a new and powerful interest comes into play—the interest the federal courts have in controlling their own processes.

While the internal mechanisms of the federal courts, their evidentiary rules and procedures may be of interest to the states, the federal judiciary under our federal system must operate independent of state controls. That the balance must be struck in this manner derives directly from the nature of our government. There is a distinction between deference and subordination.

Hanna v. Plumer, 380 U.S. 460 (1965), underscores the authority which the federal government retains over its judicial processes. In holding that service of process in a civil diversity action is to be made in the manner prescribed in the Federal Rules of Civil Procedure rather than state law, the Court held:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the enabling act.

380 U.S. at 472.

Further support for this analysis is found in cases such as *Pusey and Jones v. Hanssen*, 261 U.S. 491, 497-99 (1923) (remedial right to proceed in federal court cannot be enlarged by a state statute) and *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538-39 (1958) (internal citations omitted):

> It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge jury relationship in the federal courts.
> . . .
>
> [S]tate laws cannot alter the essential character or function of a federal court because that function is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court. . . .

The discussion of the relationship between the federal and state governments in *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819), while it involved Congressional power, is applicable to the situation at hand. After resolving that Congress had the power to incorporate a bank, the Court turned to the question of whether Maryland could tax the bank without violating the Constitution. The Court held that it could not. The reasons go to the heart of our federal system and the respect which must be given by the states to federal processes:

> The great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries. . . . There are, 1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3d. That where this repugnancy exists, that authority which is supreme must control. . . .

17 U.S. at 426.

The rule proposed by the state does not give adequate weight to the interests of the federal judiciary. Under their rule, state law would govern the operation of the

federal courts. Federal law should control federal court processes. The state's proposal should be rejected.

2. *The procedural default rule would upset the statutory scheme adopted by Congress in 1966 and 1976.*

Congress relied on the *Townsend* standard when it drafted the evidentiary rules for habeas corpus hearings. It is entirely likely that Congress would have struck the balance in the hearing process differently had the cause and prejudice standard been applicable to the question of when a hearing should be held. The states have also relied on the existing federal standards in determining how to structure their post-conviction and appellate procedures. The suggestion by the amici that this case does not present a situation in which there are any reliance interests is not well-founded. The Court should not pull the underpinnings from the statutory scheme.

3. *Application of the cause and prejudice standard would virtually eliminate federal habeas corpus review in many situations.*

Application of the cause and prejudice standard proposed by the state in conjunction with the holding in *Coleman* that when there is no constitutional right to counsel, attorney ineffectiveness would not constitute cause for a procedural default could eliminate any possibility of federal habeas review in many situations.[22] Mr.

[22] Mr. Tamayo-Reyes does not concede that he had no right to effective representation on his post-conviction petition. *Coleman* is distinguishable. The proceeding on which the default occurred was not the first opportunity which Coleman had had to challenge the evidentiary rulings he sought to bring into federal court. He defaulted on appeal from a post-conviction proceeding in which he had been given the opportunity to raise his claims. 115 L.Ed.2d at 673. By contrast, the post-conviction proceeding in this case was the *first* opportunity that Mr. Tamayo-Reyes had to challenge the state's failure to provide him with adequate interpreter services so that he could understand the proceedings at which he was convicted. In addition, Oregon has established a system to provide representation for post-conviction petitioners. Having done so, it must ensure that the constitutional rights to counsel, equal protection and due process are not violated. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (state must provide due process in a system it creates).

Tamayo-Reyes' case, as do many others, comes to federal court after state post-conviction proceedings. Application of the cause and prejudice standard to his attorney's failings, if they are found to be inadequate but not constitutionally defective, would prevent him from utilizing the full federal habeas processes. The federal court would hear his claim; it would, however, not be able to fairly resolve it.

The rule sought by the state would create the anomalous situation in which a petitioner such as Mr. Tamayo-Reyes could be better off without counsel. If he, as a non-English speaking, unsophisticated and uneducated person, had conducted the proceeding in the state court, cause could be found.

On the other hand, application of *Sykes* to a *pro se* prisoner could be fundamentally unfair. *Sykes* assumes an ongoing state judicial process with rules which can be followed. In many post-conviction proceedings, however, an indigent *pro se* prisoner would be unable to investigate or call witnesses to a courtroom which he might not even see. The rules could not be the same in this situation. *Sykes*, then, would be inapplicable.

4. *A change in the law is not needed to limit federal evidentiary hearings.*

The state suggests that a rule which makes it extremely difficult to obtain evidentiary hearings in habeas cases is necessary because a lesser standard would encourage a myriad of hearings. (Pet. Br. at 13.) That argument has no factual basis.

The *Townsend* standard which the state opposes has been the governing law for nearly three decades, a sig-

nificant period in which to determine whether it encourages disrespect for state interests or generates litigation which unduly burdens the federal courts. The record reveals that no such problem exists. The straw man which the state attempts to set up—wily habeas petitioners finding new evidence in every case to obtain reexamination in federal court—simply has not materialized.

Total filings in habeas corpus cases per state prisoner remained relatively constant from 1945-1962, rose dramatically from 1962-1970, but have *steadily decreased* since then. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, *supra*, at 162. The decrease since 1970 has been dramatic, from 5.05 filings per every hundred state prisoners in 1970 to 1.85 in 1988. *Id.* The number of evidentiary hearings in habeas corpus has also *declined* significantly since the mid-1960's, that is since *Townsend*. *Id.* at 166. The number decreased from 11.03 percent of the cases in 1965 to only 1.11 percent in 1988. Viewed from a different perspective, the number of hearings per filing in habeas corpus cases is far smaller than the number of trials in other civil cases which fell from 11.6 percent in 1965 to 5.03 percent in 1988. *Id.* at 167.

In the face of these numbers, it is difficult to give credence to the claim that the federal courts are regularly interfering with the states and undermining their interests in finality of their judgments and their own processes. The existing standards which the state opposes place significant restrictions on habeas corpus hearings, give considerable deference to state interests, and have not lead to a significant number of hearings.

5. *Federal evidentiary hearings involve a number of issues which cannot be considered under the cause and prejudice rubric.*

Habeas hearings can involve several distinct issues. At times, such a hearing would be devoted to consideration

of the substantive issue on which a petitioner seeks relief. This is the situation in Mr. Tamayo-Reyes' case. At other times, however, a habeas hearing is devoted to consideration of whether a claim was defaulted, or whether cause and prejudice exists for such a default. *See Buffalo v. Sunn*, 854 F.2d 1158 (9th Cir. 1988). These distinctions must be accommodated in the exposition of a rule regarding the right to a hearing. Cause and prejudice is inapplicable to consideration of purely federal procedural issues.

In addition, the desire to present facts in a federal hearing will follow a wide variety of circumstances. The situation present in this case, a federal evidentiary hearing after a state post-conviction proceeding with inadequate counsel, is only one such possibility. A federal evidentiary hearing may be desired when a claim has been exhausted on direct appeal without any post-conviction process. In some states, post-conviction proceedings may be initiated at the appellate, rather than trial, level. *See* Wash. R. App. P. 16.5; *Ylst v. Nunnemaker*, 115 L.Ed.2d 706 (1991). Factual development may not be permitted in some such situations. In some states no counsel is made available to a post-conviction petitioner and the prisoner is not permitted to investigate outside the prison walls. *See Murray v. Giarratano*, 492 U.S. 1 (1989).

Transplanting the *Sykes* "cause" rule onto these widely varying circumstances will not simplify the law or limit litigation. Federal review will be undertaken whether or not *Sykes* is applicable to the question of whether a hearing should be held. Litigation would be shifted from the merits to questions of procedure. The rule proposed by the state would only limit the independence of the federal judiciary.

6. *Just punishment is important.*

The Court's discussions of the importance of finality have focussed on the needs of both society and defendants

for closure in criminal proceedings. These are unquestionably important concerns.

Just punishment is, however, critical both to society and people convicted of crime. If questions exist about the fairness of punishment, the entire body politic is degraded and dehumanized. *See Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (aim of punishment must be to "protect the dignity of society itself from the barbarity of exacting mindless vengeance").

For the defendant, fairness is critical to the effectiveness and propriety of punishment and the attitude with which a person will return to society. When we treat a person with dignity and respect in the criminal justice system, we start the process of reintegration into society and lay the groundwork for acceptance of the punishment. The importance to society as a whole of treating criminal defendants with respect and dignity is undervalued in the state's argument.

7. *Habeas corpus remains an important remedy for review of constitutional violations.*

While the states contend that they have improved their record of observance of federal constitutional rights in the past three decades, the evidence suggests that a role continues to exist for federal review through the habeas corpus processes. The number of reversals in certain classes of habeas corpus cases is alarmingly high. Fully 70 percent of death penalty habeas corpus cases decided in the period 1976-1983 resulted in vacation of the sentence or judgment. *See Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J. Dissenting). Other, more recent statistics place the rate at which relief is granted near 50 percent. *See*, Kathleen Pitchel, *The New Habeas*, 42 Hastings L.J. 939, 1038 fn 551 (1991). That record suggests that at least some state courts remain insensitive to federal constitutional rights. Fairness dictates that the federal courthouse door remain open.

8. *The cause and prejudice standard would discourage the states from establishing effective post-conviction procedures.*

Application of the cause and prejudice rule would encourage the states to engage in the type of conduct which this Court has called "sandbagging" by defense counsel. *See Wainwright v. Sykes*, 433 U.S. at 89. If the states know that they can insulate the decisions of their courts from federal habeas review by establishing systems which provide ineffective representation, there would be little incentive to improve the quality of those systems.[23]

V. THE JUDGMENT OF THE NINTH CIRCUIT SHOULD BE AFFIRMED.

A. Under the Applicable Standards, Mr. Tamayo-Reyes Is Entitled to an Evidentiary Hearing.

Judge Trott correctly found that material facts which are necessary to a proper resolution of Mr. Tamayo-Reyes' claims were not adequately presented to the state court. The requirements for an evidentiary hearing under the fifth subsection of *Townsend* were met. Under sub-

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[23] Deliberately creating a system which provides inadequate counsel might be found to violate the due process clause. As the decision in *Coleman v. Thompson* reveals, however, it is extremely difficult to prove that type of conduct.

Examination of the system of post-conviction relief in Oregon might very well reveal significant problems. While counsel is made available to the petitioners, the resources expended are generally inadequate. The standard fee is roughly $500.00 to $650.00 per case, depending on whether the attorney handling the case is acting under contract or on an appointed basis. Telephone interview with Ann Christian, Oregon State Court Administrator (December 17, 1991). Petitions are "rarely" resolved with live testimony. Discussions with a member of the Oregon Judiciary indicates that roughly 2-3% of post-conviction petitions are decided in petitioner's favor, and live testimony is taken in even fewer instances. Telephone interviw with Judge G. Barber, Marion County, Oregon Circuit Court Judge (December 17, 1991) (Judge Barber handles a large majority of the post-conviction petitions in Oregon).

section (d)(3) of § 2254, the presumption of correctness was overcome. Mr. Tamayo-Reyes fairly presented his claims to the state court. As stated in *Vasquez v. Hillery*:

> We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state court.

474 U.S. 254, 257-258. Judge Trott here, as was the district court in *Vasquez v. Hillery*:

> was evidently motivated by a responsible concern that [the district court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history.

474 U.S. at 260. *Vasquez v. Hillery* and *McCleskey v. Kemp* are indistinguishable. A federal evidentiary hearing is mandatory.

B. Mr. Tamayo-Reyes Did Not Engage in a Procedural Default.

The state court addressed the merits of Mr. Tamayo-Reyes' federal constitutional claim. No state procedural bar precluded such consideration.[24] The foundation requirement for application of the cause and prejudice standard is absent because the finding of the state post-conviction court does not rest on any adequate or independent state ground.

In addition, the record of the state post-conviction proceeding reveals that Mr. Tamayo-Reyes did not violate any state rules. He did not fail to comply with any notice or filing requirement, contemporaneous objection rule, or any of the other rules which this Court has considered sufficient to constitute a bar to federal consideration of a state prisoner's claim.

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[24] Oregon has adopted both *Fay* and *Townsend*. *See Church v. Gladden*, 244 Or. 308, 312, 417 P.2d 993, 996 (1966).

The Ninth Circuit correctly found that Mr. Tamayo-Reyes did not engage in a deliberate bypass of the state proceedings. In these circumstances, a federal habeas corpus hearing is mandatory.

C. The Judgment Should Be Affirmed Even if the Court Adopts the Cause and Prejudice Standard.

In the circumstances of this case, the judgment of the Ninth Circuit should be affirmed regardless of the standard employed. Any inadequacy in presentation of the material facts was the fault of Mr. Tamayo-Reyes' post-conviction counsel. Under the peculiar facts of this case, Mr. Tamayo-Reyes cannot be bound by those failings.

The failure of counsel to offer expert testimony, or even a Spanish dictionary, fell below the level of representation required by the Sixth Amendment. The quality of the interpretation was the only issue in the post-conviction proceeding. That quality could not be measured without some evidence to which the court could refer.

The affidavit from the expert hired in the federal court and reference to standard Spanish dictionaries show that Mr. Tamayo-Reyes was prejudiced by his counsel's failings. The interpretation was clearly deficient. He did not understand the mental element of the charge or that he was found guilty.

The ineffective representation constitutes cause in this case because the state post-conviction proceeding was the first opportunity which Mr. Tamayo-Reyes had to present that claim. Moreover, the state was obligated to provide constitutionality competent counsel once it established a system for counsel in post-conviction proceedings. *See supra* pp. 40-41 fn. 22.

A hearing is particularly important in this case because it involves a habeas petitioner who may well be factually innocent. *See Murray v. Carrier*, 477 U.S. 478, 495-496 (1986). Mr. Tamayo-Reyes never admitted his

guilt. The record reveals that he believed he would have a trial. The plea petition shows a potential mental state defense. The state record also shows a potential defense of self-defense. The whole point of Mr. Tamayo-Reyes' presentation in the state court and his efforts in the federal court was to establish his claim that he was found guilty of an offense of which he is innocent and that, when he was taken through a no contest plea, he thought he was invoking the right to present witnesses who could have proved his case.

The findings in the state court are clearly and convincingly wrong. This case presents the rare circumstances in which a federal hearing should be held, even under a cause and prejudice standard.

The appropriateness of a hearing in this case is further supported by the fact that the failing in the first instance was the *state court's*, not the prosecutor's, counsel's nor Mr. Tamayo-Reyes'. The state trial court had the obligation to ensure that Mr. Tamayo-Reyes was provided with an interpreter who would properly translate for him. *See* Or. Evid. Code 604 (Or. Rev. Stat. § 40.325) (Interpreter required in court proceedings for "handicapped person" which term is defined to mean "a person who cannot readily understand or communicate in the English language." OEC 604(6)(a) (ORS 40.325(6)(a)). It did not do so. The state appeals in this proceeding with unclean hands. *See, Sanders v. United States*, 373 U.S. at 17 (habeas corpus is an equitable remedy).

The failing is of the most fundamental nature, affecting the very integrity of the process which led to Mr. Tamayo-Reyes' conviction. The writ of habeas corpus is intended to correct this type of failing in the judicial process.

CONCLUSION

For all the reasons set forth herein, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed and an evidentiary hearing should be held.

Respectfully submitted,

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No. 90-1859

In the Supreme Court of the United States

OCTOBER TERM, 1991

J.C. KEENEY,

Petitioner,

v.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The parties' positions in this case reduce to two central points of disagreement: (1) did Congress codify the "deliberate by-pass" standard for determining when a federal habeas petitioner may demand an evidentiary hearing to develop material facts that were not developed in state court; (2) if Congress has not legislatively prescribed that standard, does it remain an appropriate standard for this Court to apply? While respondent's brief addresses these core points, it also incorporates a host of arguments that have no proper bearing on the question presented. It is helpful, therefore, to begin this reply by clarifying what is not at issue.

I.

A. The Interpreter's Translation of the Plea Petition and Plea Hearing Is Not at Issue.

Much of respondent's statement of the case is spent discussing what respondent perceives to be the interpreter's (Ben Sanchez') failure to translate the plea petition and the events at the plea hearing accurately. Respondent never explains the reason for his extensive focus on this factual point, but presumably the discussion is designed to bolster his later suggestion that he is innocent of any criminal conduct, Resp. Br. 55,[1] and to impugn the integrity of the state court proceedings as a whole. The simple answer to respondent's discussion, however, is that this claim has been fully adjudicated by both state and federal courts, respondent lost in both forums, and he no longer may view the evidence in the light most favorable to him. Instead, as the procedural posture of the case reveals, he must accept as conclusive the lower courts' determinations that the translation was, on whole, accurate and complete.

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[1]Citations to the Respondent's Brief are to the typewritten copy. The printed copy has not yet been prepared.

The factual dispute in both the state post-conviction and federal habeas proceedings centered on the adequacy of Ben Sanchez' translation. Respondent claimed his no-contest plea was not knowing or intelligent because Sanchez' translation was inadequate in two respects. First, he argued that Sanchez did not translate the mental element of manslaughter correctly. Second, and more generally, he argued that Sanchez did not adequately explain what was going on during the plea hearing and did not tell him the rights he was giving up. The state post-conviction court rejected both claims, finding that Sanchez' translation had been "correc[t], ful[l], and accurat[e]." J.A. 51.

On federal habeas, the Ninth Circuit recognized the dual nature of respondent's factual claims. *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1494 (9th Cir. 1991). It explained: "The first [claim] is that Sanchez did not translate adequately the mens rea element of manslaughter. The second is that Sanchez did not translate adequately the plea form and plea proceeding." *Ibid.* The court held that respondent was entitled to an evidentiary hearing on the first issue. *Id.*, at 1502. It concluded, however, that the state court finding on the second issue — that Sanchez correctly and accurately translated the plea petition and the plea proceedings — was binding. *Ibid.* It thus affirmed the district court's judgment in part and reversed and remanded in part. *Ibid.*

Because of the Ninth Circuit's partial affirmance of the district court, certain facts are now a given. Specifically, it is settled that Sanchez correctly and completely translated the rights explained in the plea petition, that he accurately translated the state trial court's careful recitation of the rights respondent was giving up, that he properly translated the plea proceedings, and that respondent understood that pleading no-contest meant he was effectively pleading guilty and there would be no jury trial. If

respondent wanted to quarrel with these factual determinations, it was incumbent upon him to cross-petition from the Ninth Circuit's judgment. *Trans World Airlines v. Thurston*, 469 U.S. 111, 119 n. 14 (1985); *FEA v. Algonquin SNG*, 426 U.S. 548, 560 n. 11 (1976). Because he did not, the facts are settled contrary to the lengthy recitations and conclusions set forth in his brief.

B. The Accuracy of the Interpreter's Translation of the *Mens Rea* Element of the Crime Is Not To Be Decided Now.

What does remain at least arguably open is the first, much narrower factual issue the Ninth Circuit noted: whether Sanchez "translate[d] adequately the mens rea element of manslaughter." It is open only to the extent that a further evidentiary hearing may be required to answer the question, however. If a further hearing is required (and that is the issue to be resolved here), the district court will have to decide the factual dispute on the basis of the evidence adduced at that hearing. Respondent's brief, however, treats the factual question as if this Court should decide it or perhaps even consider it resolved.[2] The only issue to be resolved now, however, is whether the Ninth Circuit correctly ordered a new evidentiary hearing so that respondent could

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[2]The brief asserts quite confidently that Sanchez' Spanish is "gibberish." Resp. Br. 8. Respondent, however, never testified that Sanchez' Spanish was unintelligible, and the post-conviction transcript is replete with statements that respondent understood what Sanchez said to him. J.A. 23, 24, 31, 32. Indeed, much of the "evidence" on which respondent's brief bases its criticism of Sanchez' Spanish has never been offered at trial, tested by cross-examination or counter testimony, or ruled on by a trier of fact. Indeed, if it were as clear as respondent's brief assumes that Sanchez failed to translate the mens rea element of manslaughter correctly, then it is puzzling how respondent can claim his state post-conviction counsel failed to develop the record sufficiently or that a further record is needed.

develop facts on this point which he did not present to the state court.

C. The Record Does Not Establish Respondent's Innocence.

Respondent devotes portions of his brief to the suggestion that he is either altogether innocent of wrongdoing, or he at least has valid defenses to his criminal charges. He argues, for example, that "this case . . . involves a habeas petitioner who may well be innocent." Resp. Br. 55. Whether a prisoner is guilty or innocent is always an important question, but the record provides no basis to doubt respondent's guilt.

There is no dispute that respondent stabbed and killed the victim, J.A. 26, and respondent's suggestion that alcohol may have impaired his intent or that he may have a claim of self-defense finds no support in the record. On intent, respondent's trial attorney stated: "[T]here was no intention on [respondent's] part *at least up until the time he turned around with that knife* to kill anybody, and I think that the facts are sufficiently in doubt to award this plea, that of manslaughter." Jan. 22, 1985 Tr. 4 (emphasis added). Far from suggesting an insufficient mental state to establish manslaughter, the record reveals the only question was whether respondent's intent was sufficiently in doubt to justify a plea to anything less than murder. Moreover, there has never been any claim in state court that respondent was too intoxicated to possess the requisite mental state for manslaughter, nor any claim that his trial counsel was ineffective for failing to raise this issue.

On the suggestion of self-defense, the record reveals that this was "a situation where the [v]ictim was just trying to be a good Samaritan in trying to break up a violent situation [between respondent and his fiancée], and he ended up paying the ultimate price with his life." Jan. 22, 1985 Tr. 9. It is difficult to see how

stabbing the good Samaritan constituted self-defense.[3] But even if it did, respondent never asserted a claim of self-defense in state court, nor has he ever claimed that his trial counsel was inadequate for not doing so. Neither the record nor the claims asserted in this litigation suggest, as respondent's brief now does, that this is a case in which respondent "may well be factually innocent."[4] Resp. Br. 55.

D. Whether Post-conviction Trial Counsel's Performance Establishes "Cause" Is Not at Issue.

At least twice in his brief, respondent argues that his state post-conviction counsel was incompetent for not developing a better record and that even under a "cause and prejudice" standard, he would be entitled to a new evidentiary hearing because his attorney's performance constitutes cause. Resp. Br. 47-48 n. 22, 55. In doing so, he urges this Court to reexamine its decision in *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 2566-67 (1991) (incompetence of post-conviction counsel does not constitute "cause"), or at least to distinguish it. Not only does he ask the Court to decide an issue not encompassed in the question presented, but his claim is premature.

As the State urged in its opening brief, the proper disposition of this case is to remand it to the lower courts so that they may

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[3]Respondent's trial counsel never mentioned any fact that would suggest a self-defense claim. The prosecutor explained that respondent turned his anger on the victim, who was holding a small chair as he tried to break up the knife fight between respondent and his fiancée. Jan. 22, 1985 Tr. 8. The reference to a small chair is the only conceivable factual basis respondent has for thinking a self-defense claim might exist. The prosecutor's later description of the victim as the Good Samaritan, however, undercuts that possibility, and no self-defense claim was ever made in state court.

[4]Moreover, if he is innocent, that claim would be an exception to the ordinary requirement of cause and prejudice. *McCleskey v. Zant*, ___ U.S. ___ 111 S. Ct. 1454, 1470 (1991); *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

apply the correct standard in the first instance. Because the correct standard for granting a new evidentiary hearing was unsettled at the time petitioner filed his habeas petition, it may be that he relied on the more generous "deliberate by-pass" test and did not come forward with evidence that would establish cause. Pet. Br. 21. The decision in *Coleman* may pose difficulties for respondent in satisfying the "cause" prong of the test if the only reason for his by-pass was his counsel's performance. Because this question involves facts not yet developed, it is best left to the lower courts.

II.

Respondent's arguments focus more precisely on the question before the Court once he begins to address 28 U.S.C. section 2254(d) and the case law relevant to the "deliberate by-pass" and "cause and prejudice" standards. Ultimately, however, respondent fails to support his view of what the statute requires, and he is unable to explain persuasively why deliberate by-pass should be preserved in this context when it has proven so unsatisfactory in all others.

A. History Does Not Compel the Deliberate By-Pass Standard in Order Properly to Preserve Federal Court Habeas Power.

Respondent begins his argument with an overview of 100 years of statutory development and case law which, he asserts, establishes the integral role of evidentiary hearings in federal habeas. Respondent's statutory discussion begs the question. The fact that the statutes vest federal courts with power to hold evidentiary hearings or set out procedures for doing so says nothing about when hearings are required — which is the question presented by this case. On this point, even the decision in *Townsend v. Sain*, 372 U.S. 293, 318 (1963), acknowledged that while a federal court has the power to hold evidentiary

hearings, it "may, and ordinarily should accept the facts" found by the state court.

Similarly, the 100 years of case law respondent cites does not demonstrate that evidentiary hearings are an integral part of the process when the petitioner had a full and fair opportunity to develop the facts in state court. Respondent relies on seven cases that were decided before *Townsend*. Three of them involve habeas petitioners seeking review of federal convictions.[5] Because federal habeas was the first opportunity these petitioners had to establish the facts relevant to their constitutional claims, these cases have no bearing on the role evidentiary hearings should play when a state prisoner had a full and fair opportunity to develop the facts in state court. Two cases respondent cites address the availability of habeas relief for petitioners who claimed that mob violence rendered their state hearings a farce.[6] Recognition of the role federal evidentiary hearings play in these circumstances does not suggest that they play the same role elsewhere. One case respondent cites was on direct review from the Nebraska Supreme Court.[7] It says nothing about the right to a federal evidentiary hearing, much less the relation between federal hearings and state fact findings.

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[5] In *Walker v. Johnston*, 312 U.S. 275 (1941), the petitioner challenged his federal conviction claiming that his waiver of counsel was involuntary. In *Ex Parte Cuddy*, 131 U.S. 280 (1889), the petitioner challenged his federal conviction for contempt claiming that the district court had lacked jurisdiction. In *Wong Doo v. United States*, 265 U.S. 239 (1924), the petitioner challenged his detention by the Immigration and Naturalization Service.

[6] *See Moore v. Dempsey*, 261 U.S. 86, 92 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915).

[7] *Hawk v. Olson*, 326 U.S. 271 (1945).

Only one of respondent's seven authorities, *Brown v. Allen*, 344 U.S. 443 (1953), discusses when a state prisoner who had a full and fair opportunity to develop the facts in state court is entitled to a federal evidentiary hearing. As respondent observes, *Brown* recognized that 28 U.S.C. section 2243 provides that "[a] federal judge on a habeas corpus application is required 'to summarily hear and determine the facts.'" *Id.*, at 462 (quoting section 2243). But respondent fails to note that immediately after quoting section 2243, *Brown* explains that this provision does not require a federal court to hold new evidentiary hearings if it "is satisfied, by the record, that the state process has given fair consideration to the issues." *Ibid.* As Justice Frankfurter's concurring opinion recognized, when the federal constitutional issue turns on a factual dispute, a district court may accept the state court fact finding "[u]nless a vital flaw be found in the process of ascertaining such facts." *Id.*, at 506-507.

B. Congress Did Not Adopt *Townsend*'s Deliberate By-Pass Test.

Respondent more closely joins issues with the State when he maintains that Congress adopted *Townsend*'s deliberate by-pass standard, thereby codifying *Townsend*'s holding and precluding further judicial refinement in this area. Although respondent relies primarily on the 1966 amendments to 28 U.S.C. section 2254, he points to nothing in the language Congress added that expressly codifies the deliberate by-pass standard or even obliquely refers to it. He cannot find anything in the legislative history to show that Congress specifically intended to ratify *Townsend*'s use of the deliberate by-pass standard or indeed even discussed it. And he never explains how the deliberate by-pass standard is consistent with the underlying purpose of section

2254(d), which is to reduce the friction between state and federal courts. *See Sumner v. Mata*, 449 U.S. 539, 550 (1981).

Respondent's argument rests on one point: Congress used some of the general criteria stated in *Townsend* when it fashioned criteria for section 2254(d). From this, respondent infers a conclusive congressional intent to codify *Townsend*'s use of the deliberate by-pass standard as well. The Court, however, rejected a comparable argument in *McCleskey v. Zant*, ___ U.S.___, 111 S. Ct. 1454 (1991).

At issue in *McCleskey* was whether the 1966 amendment to 28 U.S.C. section 2244 codified the Court's application of the deliberate by-pass standard to successive habeas petitions in *Sanders v. United States*, 373 U.S. 1 (1963). Section 2244, as amended in 1966, provides that a successive petition need not be entertained if a federal court concludes that the applicant has "on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." Although the phrase "deliberately withheld" could have been read as codifying *Sanders*' use of the deliberate by-pass standard, the *McCleskey* Court insisted on a clearer expression of congressional intent before drawing such an inference. 111 S. Ct., at 1466. Such a reading of the statute would both unnecessarily limit the "complex and evolving" body of law relevant to successive claims, and it would alter the cooperative role the Court has played in implementing the habeas statutes. *Id.*, at 1467.

Respondent asks the Court to make a broader interpretative leap than the Court declined to make in *McCleskey*. Although the language of section 2244 referred to "deliberately with[o]ld[ing]" claims, nothing in the language of section 2254(d) provides any basis for inferring that Congress meant to approve or ratify the deliberate by-pass standard in *Townsend*. Moreover, unlike the

1966 amendment to the statute in *McCleskey*, the legislative history of section 2254(d) provides some guidance on Congress' intent. The only direct explanation of section 2254(d) comes from the report prepared by the Committee on Habeas Corpus of the Judicial Conference of the United States. The portion of the report that explains section 2254(d) focuses on deference to state court fact finding. H.R. Rep. No. 1384, 88th Cong. 2d Sess., 23-25 (1964). Only one reference to *Townsend* occurs in the explanation of section 2254(d). The report quotes *Townsend* for the proposition that the duty of a federal court on habeas to scrutinize the state court record "is no less exacting" than the Supreme Court's duty to review the state court record on direct review. *Id.*, at 24. This single reference to *Townsend* hardly suggests that Congress intended to ratify the deliberate by-pass standard. Rather, it cuts against it. It emphasizes that the state court record should play a particularly important role in the federal review and likens that review to an appellate procedure rather than a de novo trial.[8]

Respondent advances several arguments in an effort to circumvent these weaknesses in his theory. He questions the validity of the 1964 report because the 1966 version of the bill

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[8]*McCleskey* also noted that *Sanders* referred to a passage from *Townsend* that discussed "inexcusable neglect." 111 S.Ct., at 1467. *McCleskey* concluded that *Sanders* had not intended to make deliberate by-pass the sole criterion for abuse of the writ and explained that *Sanders*' reference to inexcusable neglect was best understood as adopting a cause and prejudice standard. *Id.*, at 1467-68. The passage from *Townsend* to which *Sanders* referred (and which *McCleskey* interpreted) was the passage explaining when the failure to develop material facts adequately in state court will entitle a habeas petitioner to a federal evidentiary hearing. *See* 111 S. Ct., at 1467 (citing *Townsend v. Sain*, 372 U.S., at 317). *McCleskey*'s gloss on *Sanders*' and *Townsend*'s use of "inexcusable neglect" demonstrates that even if the 1966 Congress meant to codify the reasoning in *Townsend*, as respondent argues, it does not follow that Congress meant to preclude the use of a cause and prejudice standard.

added a subsection, which is now codified as section 2254(d)(8). That change proves little. The subsection in question here, which provides that there is no presumption of correctness if material facts were not adequately developed, remained the same. Moreover, the issue governed by subsection (d)(8) — whether the state court's factual findings are fairly supported by the facts *already* in the record — goes to errors in the state court's conclusions, not to a petitioner's failure to take advantage of state court proceedings. That change does not logically bear on Congress' intent here.

Next, respondent argues that the 1964 report reveals that the Habeas Committee rejected the interpretation the State now advances. What the report shows, however, is that the committee rejected amendments that would have made state fact findings conclusive in federal habeas regardless whether the state court hearing complied with due process or provided a full and fair opportunity to litigate the facts.[9] The State has never suggested that this is the proper rule. Rather, the State's argument has always been directed to the standard that should apply when a

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[9]The 1964 Committee report noted that two state organizations had requested certain amendments to the bill. It explained:

> Illustrative of the proposed amendments was one which would make the finding of fact of a State court conclusive in a proceeding in habeas corpus in a Federal court, even though the State court did not have jurisdiction of the person in the State court proceeding wherein such finding was made or did not accord the prisoner a full or fair hearing in such proceeding or otherwise denied him due process of law.

H.R. Rep. No. 1384, 88th Cong., 2d Sess., 22 (1964). On the next page, the report noted that if a habeas bill were introduced in the 1964 Congress, it was "reasonably certain an amendment with respect to the effect to be given to State court factual determinations . . . will be urged by the State organizations referred to above." *Id.*, at 23. It then explained that "Of course, an amendment such as proposed to our Committee by the representatives of such State organizations, as stated above, would be wholly incompatible with the duty of Federal courts to determine Federal constitutional questions." *Ibid.*

habeas petitioner has had a full and fair opportunity to develop facts in state court.

Respondent further attempts to avoid the Court's decision in *McCleskey v. Zant* by arguing that it has little bearing on determining Congress's intent here. He urges that *McCleskey* found that cause and prejudice was consistent with the decisions that preceded *Fay*,[10] while here, application of cause and prejudice to evidentiary hearings would "repudiate long standing law," a point he thinks the State concedes. Resp. Br. 33. Respondent misperceives both judicial history and the State's position. As the State pointed out in its opening brief, adoption of the cause and prejudice standard would return the analysis to the rule in *Brown* that a federal evidentiary hearing is required only where good cause exists for the petitioner's failure to develop facts in state court or, as Justice Frankfurter put it, where there was "a vital flaw" in the state processes. *Brown v. Allen*, 344 U.S., at 506.

Finally, respondent argues that *McCleskey*'s reasoning is limited to situations where the Court has taken an active role in defining the procedures for habeas. He asserts that "Congress has taken the lead role in defining when evidentiary hearings should be held in habeas corpus actions," thus divesting the Court of any power to continue to refine judicial precedents in this area. Resp. Br. 34. Respondent's view of Congress' "lead" role is mistaken. Development of the law in this area began with decisions announced by this Court. In 1952, the Court explained in *Brown v. Allen* when evidentiary hearing are required. The Court's articulation of the relevant principles continued in 1963, when the Court laid down broad guidelines in *Townsend*. While

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[10]*Fay v. Noia*, 372 U.S. 391 (1963).

Congress entered this area when it adopted section 2254(d), nothing in the language of the statute preempts the Court's role in advancing Congress' purpose of minimizing friction between the state and federal courts. In short, *McCleskey*'s conclusion that a court should be hesitant to assume that Congress has foreclosed judicial development in habeas corpus applies with equal if not greater force here.

C. Both Precedent and Policy Support Adopting the Cause and Prejudice Test in this Case.

Respondent recognizes that if he is wrong and Congress has not adopted the "deliberate by-pass" test, then he must confront this Court's decisions applying the cause and prejudice standard. He attempts to distinguish these cases by means of two related but separate arguments: First, he urges that this case differs from the cases employing the cause and prejudice standard because they all involved "violations of a state's procedural rules," a situation he assumes does not exist here. Resp. Br. 37. Second, he argues that cause and prejudice applies only when an adequate and independent state ground exists to preclude federal review. He maintains that when independent and adequate state grounds do not exist, principles of comity and federalism weigh less heavily. Resp. Br. 42.

The assumption underlying respondent's first argument — that no Oregon procedural rule requires a litigant to present all relevant evidence at a single state hearing — is simply incorrect. Few rules of procedure are more basic than the requirement that a litigant bring forth all his evidence at one hearing. In Oregon, this interest in efficient, full, and final hearings is expressed by several state procedural rules. Those rules narrowly limit the circumstances in which a criminal defendant can seek to introduce evidence he or she did not offer initially. Or. R. Civ. P. 64

(new trial may be granted for newly discovered evidence that could not have reasonably been discovered by trial); *see* Or. Rev. Stat. § 136.535(4) (same rule applicable to criminal proceedings). The same limits apply to a state post-conviction petitioner's ability to reopen the proceeding to submit evidence after the post-conviction hearing has concluded. *See* Or. R. Civ. P. 64. Finally, Oregon statutes limit a state prisoner to only one post-conviction proceeding, thus providing a strong incentive to present all issues and evidence at a single hearing. *See* Or. Rev. Stat. § 138.550(3).[11]

Respondent's second argument — that the cause and prejudice standard is squarely rooted in, and limited to, circumstances involving "adequate and independent state grounds" that would bar federal review — is wrong, too. The genesis of the cause and prejudice standard is not in the "independent and adequate state ground" doctrine at all. Rather, it is in the recognition that procedural rules often serve important state interests that should temper a federal court's otherwise unbounded power to reach a habeas petitioner's federal claims. To be sure, some of the "cause and prejudice" cases have involved claims that would have been barred on direct review by the "adequate and independent state ground" doctrine, and the Court has recognized that reaching those claims in federal habeas raises questions of comity

[11]State law does not permit a second post-conviction challenge to a criminal conviction unless the grounds for relief could not reasonably have been asserted in the first post-conviction proceeding. *Martz v. Maass*, ___ Or. App. ___, ___ P.2d ___ (Dec. 26, 1991); *Dotta v. Maass*, 91 Or. App. 222, 224, 754 P.2d 36, *rev. denied* 306 Or. 413, 761 P.2d 531 (1988). These decisions express the State's interest in requiring state prisoners to litigate fully and at the first opportunity any challenge to their convictions. Similar appellate rules do not permit parties to go beyond the record created at the trial level. *State v. Rodinsky*, 60 Or. App. 193, 197, 653 P.2d 551 (1982); *State v. Rutledge*, 2 Or. App. 374, 376-77, 468 P.2d 913 (1970).

and federalism. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 81-82 (1977). But to suggest, as respondent does, that the cause and prejudice test is somehow limited to this context ignores the real basis for decision in these cases, and it overlooks decisions applying cause and prejudice in circumstances that have not involved state prisoners or adequate and independent procedural grounds at all.

The cause and prejudice standard was first articulated in *Davis v. United States*, 411 U.S. 233 (1973). There, a federal prisoner had failed to raise a jury selection challenge in his federal trial, contrary to a federal rule of procedure that declared the claim was waived if not timely raised. The Court held that the issue could not be asserted as a ground for federal habeas relief unless petitioner could show "cause and prejudice" for the waiver. The Court adopted this standard because of the need to accommodate the federal judiciary's interests in having claims litigated at the first full and fair opportunity for doing so. *Id.*, at 241-42.

That same rationale has guided the Court in extending the cause and prejudice test to other contexts. In *Francis v. Henderson*, 425 U.S. 536 (1976), for example, the Court was faced with a state prisoner who failed to raise a jury challenge at trial, but sought to do so in his habeas petition. The Court applied the cause and prejudice test from *Davis* not because the state ground provided an independent basis for the judgment but because it served "considerations of comity and concerns for the orderly administration of criminal justice." *Id.*, at 538-39. Moreover, the Court could find no reason "to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants," a point that directly refutes respondent's suggestion that cause and prejudice is

somehow limited to state procedural defaults that would serve as jurisdictional bars to direct review. *Id.*, at 538-39 and 542. Similarly, the Court has applied the cause and prejudice test where a habeas petitioner seeks to present a claim that he did not present to the state appellate courts, *Coleman v. Thompson*, *supra*, and where he failed to present a claim to a federal district court in an initial petition for habeas relief, *McCleskey v. Zant*, *supra*. Each time, the Court has reasoned that the habeas petitioner had an opportunity to raise the claim and to have it decided in an earlier state or federal hearing; and each time, the Court concluded that cause and prejudice is the correct test for the default because a more lenient standard would show too little respect for the initial forum's interest in providing a complete and final resolution of the petitioner's federal claims. *See Coleman v. Thompson*, 111 S. Ct., at 2563-65; *McCleskey v. Zant*, 111 S. Ct., at 1468-70.

Respondent's sole citation to authority in support of his argument is unavailing. He argues that *Vasquez v. Hillery*, 474 U.S. 254 (1986), demonstrates that if a claim has been at least minimally preserved in state court, a federal court may always hold an evidentiary hearing to develop additional facts. Resp. Br. 53-54. Respondent is wrong. The issue in *Vasquez* was exhaustion, not whether a federal evidentiary hearing should be held. No one disputed that the petitioner[12] in *Vasquez* had "not [been] given a full and fair hearing on his discriminatory [jury selection] claim in state court," 474 U.S., at 267 (O'Connor, J., concurring in the judgment), and that a new evidentiary hearing in federal

[12]Although the state prisoner, Booker Hillery, was the respondent in the Supreme Court, he is referred to as the habeas petitioner or the petitioner.

court was required.[13] The only question was whether the exhaustion doctrine required the petitioner to return to state court before offering new evidence. Not only was the right to a federal evidentiary hearing not at issue in *Vasquez*, but the State has never disputed in this litigation that respondent would be entitled to a federal evidentiary hearing if he, like the petitioner in *Vasquez*, had been denied a fair opportunity to develop the facts in state court.

Finally, respondent argues that because he at least raised his claim in state court, even if he did not present any real evidence on it, the federalism and comity interests at stake are significantly diminished. He never explains how that is so, nor does the suggestion withstand scrutiny.

As much as respondent would like to distinguish a failure to raise a claim at all in a prior hearing from a failure to present the prior forum with all evidence that bears on the claim, the interests at stake are the same. In the one case, the state court does not even know that the federal claim exists. In the other, the court is lead to believe a party has litigated it fully, when in fact he has not. In either circumstance, permitting the prisoner to resort to federal court for a new and more exhaustive trial "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Wainwright v. Sykes*, 433 U.S., at 90. In either circumstance, all issues which bear on a defendant's criminal charge are not being determined

[13]The state judge who decided the petitioner's discrimination claim was the same judge who selected the jurors. The district court found that the state judge was biased, that his factual findings should not be presumed correct, and that a federal evidentiary hearing was required. *See Hillery v. Pulley*, 563 F. Supp. 1228, 1235-36 (E.D. Cal. 1983). No one challenged this conclusion in either the Ninth Circuit or in this Court. *See Vasquez v. Hillery*, 474 U.S., at 267 (O'Connor, J., concurring in the judgment).

at the point at which "[s]ociety's resources have been concentrated . . . in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid.* And in either circumstance, fully making the record at the time of the state court prosecution brings benefits to both the state and federal systems: it enables the record to be made when recollection of witnesses and even physical evidence is freshest; it gives states a meaningful opportunity to fully vindicate federal interests in the first instance; it ensures a more complete record for later federal court review; it gives federal courts the benefit of fully-informed state court insights on the question; and it may result in an earlier resolution of a meritorious claim, thus sparing state and federal court resources alike, and contributing to finality of criminal litigation. *Id.*, at 88-89 (discussing policy considerations for cause and prejudice rule); *Coleman v. Thompson*, 111 S. Ct., at 2563-65 (same).

Respondent's only answer to this is to emphasize the importance of the federal habeas power, to press the significant interests of federal courts in vindicating federal constitutional rights free of the interference of state rules, and to urge that full evidentiary hearings are relatively rare now, and may be all but non-existent in the future. Resp. Br. 43-52. At bottom, however, his arguments challenge use of the cause and prejudice standard in any context, not simply in this one. Fundamentally, his quarrel is with the policies the Court has chosen to balance against concededly important federal interests. For good reason, however, the Court has recognized that the federal writ power, when it extends to state prisoners, invokes a delicate balance between the judicial branches of the coordinate state and federal governments. That the Court has tempered the use of federal habeas power in a way that carefully preserves the States' significant

role in their criminal justice systems is a wise accommodation of the multiple and often competing interests at stake.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, the court of appeals' judgment should be reversed and remanded.

Respectfully submitted,

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No. 90-1859

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1991

J. C. KEENEY,
Petitioner,

v.

JOSE TAMAYO-REYES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, IDAHO, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, TENNESSEE, AND WASHINGTON

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INTEREST OF AMICI CURIAE

Amici curiae are states that are substantially affected by the unlimited discretion that federal district courts currently enjoy to order evidentiary hearings in habeas corpus proceedings, however full and fair the state hearings were on the disputed factual issues. That unlimited discretion threatens the finality of state court factual determinations and, indirectly, of state court judgments. Amici curiae support the State of Oregon in urging reversal of the court of appeals' decision in this case.

SUMMARY OF ARGUMENT

Townsend v. *Sain* allows a federal habeas court unlimited discretion to hold an evidentiary hearing on any issue resolved by a state court no matter how full and fair the state hearing was, no matter how adequately developed the material facts were, and no matter how fairly in the record the state's finding rests. In light of this Court's recent pronouncements on the delicate interests of finality and comity that federal habeas corpus implicates, and the circumscribed role that the great writ must accordingly play, *Townsend* stands as an anachronism and an anomaly: an anachronism because it strikes a balance that this Court unconditionally abandoned in *Coleman* v. *Thompson*; an anomaly because *Townsend* allows a federal habeas court to assume the primary fact finding role in a proceeding that Congress intended and this Court declared to be collateral and secondary.

Consistent with this Court's decisions recognizing the state's vital interests in protecting the finality of its judgments, and the limited role which habeas corpus necessarily serves, a state prisoner should not receive an evidentiary hearing unless he can show that he was unlawfully deprived of a state hearing on the finding he disputes. Such a deprivation will be found only when the prisoner can show that some objective factor external to the defense impeded him. Absent this showing, a federal court should not hold an evidentiary hearing.

ARGUMENT

PRINCIPLES OF COMITY AND FEDERALISM REQUIRE THAT THE SCOPE OF FEDERAL COURT POWER TO HOLD EVIDENTIARY HEARINGS BE NARROWLY CIRCUMSCRIBED.

This case raises the question of when a federal habeas court is authorized to hold an evidentiary hearing on a disputed state factual finding. The answer lies in the proper balance that must be struck in federal/state relations when the federal court exercises its habeas corpus jurisdiction.

I. Scope of Federal Court Power to Hold Evidentiary Hearings Under Current Law

A. Townsend v. Sain

Federal courts have traditionally looked to *Townsend* v. *Sain*, 372 U.S. 293 (1963), in determining whether to hold an evidentiary hearing. *Townsend* established the following test for mandatory evidentiary hearings:

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing

reliably found the relevant facts." 372 U.S. at 312-313 (footnote omitted).

Although the Court stated that "[i]t would be unwise to overly particularize this test," it nevertheless set forth specific criteria that, if shown, necessitated an evidentiary hearing:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."[1] *Id.* at 313.

The Court noted that the "final category is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded." *Id.* at 317. Beyond the circumstances for mandatory hearings, the Court gave district court's unlimited discretion to hold evidentiary hearings:

1. As to factor (5), the Court required the petitioner to demonstrate that his failure to develop the material facts was not attributable to his "inexcusable neglect." *Id.* at 317.

> "In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. *If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.*" *Id.* at 318 (emphasis added).

"Ordinarily," the complete record of state court proceedings is indispensable to determining whether the petitioner received a full and fair hearing in state court. *Id.* at 319. Nevertheless, "there may be cases in which it is more convenient for the district judge to hold an evidentiary hearing forthwith rather than compel production of the record. It is clear that he has the power to do so." *Id.*

B. Rule 8 of the Rules Governing Habeas Corpus Proceedings

In 1976, Congress adopted Rule 8 of the Rules Governing Habeas Corpus Proceedings, which provides in relevant part:

> "If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an

evidentiary hearing is required." Rule 8(a), 28 foll. § 2254.

The Advisory Committee Note to Rule 8 explains that the circumstances governing both mandatory and discretionary evidentiary hearings are those set forth in *Townsend* v. *Sain*. Rule 8 provides, therefore, that "whether an evidentiary hearing is required" must be determined pursuant to relevant case law.

C. Applicability of 28 U.S.C. § 2254(d)

In contrast to *Townsend*, 28 U.S.C. § 2254(d) does not govern when a federal evidentiary hearing must be held, but when a federal habeas court must defer to state court factual findings. The statute provides that, when the state court has adjudicated the merits of a factual issue, the state court's findings are entitled to a presumption of correctness.[2/] 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449

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2. 28 U.S.C. § 2254(d) provides:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

U.S. 539, 547 (1981). Eight listed exceptions are available to defeat the presumption. 28 U.S.C. § 2254(d).

When the presumption of correctness is applicable, the burden rests on the petitioner to establish by convincing evidence that the state court's factual determination was erroneous. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. at 551. If the presumption is found inapplicable based on one of the enumerated factors, the petitioner need not meet the higher burden of proof to establish that the state's finding was erroneous. See *Sumner* v. *Mata*, 455 U.S. 591, 597-598 (1982). The statute does not address a petitioner's threshold entitlement to an evidentiary hearing. It is on this issue that 28 U.S.C. § 2254(d) and *Townsend* are critically different.[3/]

Section 2254(d), which postdates *Townsend*, limits, rather than expands, federal court jurisdiction to review state court rulings. "The present codification of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal courts,' *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction." *Sumner* v. *Mata*, 449 U.S. at 547-548, n.2. In its 1966 limiting amendment to section 2254(d),

3. The Advisory Committee Note to Rule 8 relies primarily on *Townsend* v. *Sain* as a basis for determining when an evidentiary hearing is mandatory. The Note states further, however, that if a petitioner shows one of the eight enumerated factors in 28 U.S.C. § 2254(d), a federal evidentiary hearing may be "force[d]." As noted above, § 2254(d) does not purport to establish when a federal evidentiary hearing is required. Both the plain language of the statute and its Legislative History leave no doubt on that point. To the extent that the Advisory Committee Note implies otherwise, it is simply incorrect.

Congress established that factual findings made by the state court system must be presumed correct in the absence of any of the eight enumerated factors. *Id.* at 550-551; 1966 U.S. Code Cong. & Ad. News 3663-3665.

By enacting the statutory presumption of correctness applicable to state court determinations of the merits of factual issues, Congress limited but did not eliminate the power of federal habeas courts to reach contrary factual determinations. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. at 550-551; 1966 U.S. Code & Cong. Ad. News 3663-3667. Under *Townsend*, federal courts retain unlimited power to hold evidentiary hearings. Although the statutory presumption applies at such hearings, it does not bar them. 28 U.S.C. § 2254(d). Because it does not bar them, no state finding is secure in its finality.

II. Considerations Relevant to Federal Court Deference to State Court Factual Adjudications

This Court has long recognized that comity and finality must be considered in determining the proper scope of federal habeas review. *Teague* v. *Lane*, 489 U.S. 288, 308 (1989). As Justice Harlan stated, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (separate opinion of Harlan, J.) Since *Mackey*, this Court has "moved in the direction of reaffirming the relevance of the likely accuracy of convictions in

determining the available scope of habeas review." *Teague* v. *Lane*, 489 U.S. at 313.

Considerations of comity and finality have been found relevant to whether decisions announcing new rules should be applied retroactively on collateral review, *Teague* v. *Lane*, 489 U.S. 288, and to the proper scope and application of the doctrines of abuse of the writ, *McCleskey* v. *Zant*, __ U.S. __, 111 S.Ct. 1454 (1991), and procedural default, *Coleman* v. *Thompson*, ___ U.S. ___, 111 S.Ct. 2546 (1991). As this Court stated in *McCleskey* v. *Zant*:

"The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.' [Citation.] And when a habeas petitioner succeeds in obtaining a new trial, the '"erosion of memory" and "dispersion of witnesses" that occur with the passage of time,' [citation], prejudice the government and diminish the chances of a reliable criminal adjudication. Though *Fay* v. *Noia, supra,* may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality. [Citations.]" 111 S.Ct. at 1468-1469.

The federal court's power to relitigate matters conclusively decided by the state court implicates these

concerns no less. The importance of finality is even greater with respect to factual, as opposed to legal, determinations. When the habeas petitioner succeeds in obtaining a federal evidentiary hearing, the '"erosion of memory' and 'dispersion of witnesses' that occur with the passage of time" severely prejudice the state and diminish the chance of a reliable factual adjudication. *Cf.* *McCleskey* v. *Zant*, 111 S.Ct. at 1474 ("By failing to raise the *Massiah* claim in 1981 [in his state post-conviction petition], McCleskey foreclosed the procedures best suited for disclosure of the facts needed for a reliable determination.")

When presented with claims of insufficient evidence or claims of clearly erroneous trial court factual findings, state courts of appeal have nct found it necessary to hold evidentiary hearings to relitigate those facts. It has long been the practice of those courts to review all factual claims on the record presented, giving deference to trial court factual determinations where appropriate. To require the state to relitigate factual matters in federal court, often years after the original state proceeding, places a burden on the state that is wholly unwarranted in all but the most extraordinary circumstances.

No principled reason exists, under this Court's view of the proper role of federal courts on habeas corpus, to allow those courts to do in collateral proceedings what state reviewing courts (or even federal reviewing courts) cannot do on direct appeal. Certainly Congress, when it enacted section 2254(d), did not intend to authorize such broad federal review. See *Marshall* v. *Lonberger*, 459 U.S. 422, 434-435 (1983). But the existence of broad federal habeas review under *Townsend* may give litigants who seek

an evidentiary hearing, like those who sought to file abusive petitions, "incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *McCleskey* v. *Zant*, 111 S.Ct. at 1469; *cf. Murray* v. *Carrier*, 477 U.S. at 491-492. On the other hand, a greater restriction on federal evidentiary hearings will compel litigants to view the state court proceedings as the "main event," rather than a "tryout on the road" for what will later be the determinative evidentiary hearing. *Cf. Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

III. A Federal Court's Discretion to Hold an Evidentiary Hearing Must Be Narrowly Circumscribed

In *Coleman* v. *Thompson*, this Court stated that *Fay* v. *Noia*, 372 U.S. 391 (1963), "was based on a conception of federal/state relations that undervalued the importance of state procedural rules," and that it "now recognize[d] the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." 111 S.Ct. at 2565. The same may be said of *Townsend*'s approach to state court adjudications of the merits of factual issues.

Townsend noted that a state court adjudication of facts was entitled to some deference, but nonetheless granted virtually unlimited power to federal courts to hold evidentiary hearings in order to relitigate factual issues conclusively determined by state courts. If state procedural rules can bar *any* consideration of a claim

raised by a federal habeas petitioner, absent a showing of cause and prejudice or fundamental miscarriage of justice, see *Coleman* v. *Thompson*, 111 S.Ct. at 2565-2566, a state court adjudication of the merits of a factual issue should similarly bar federal court relitigation of the same issue, absent extraordinary circumstances.

In *Brown* v. *Allen*, 344 U.S. 443 (1953), this Court concluded that, "[w]here the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required." *Id.* at 463. The *Townsend* Court found the *Brown* v. *Allen* standard "too general," and chose instead to delineate specific circumstances which, if shown, required an evidentiary hearing. *Townsend* v. *Sain*, 372 U.S. at 313. This Court's recent decisions in the areas of procedural default and abuse of the writ demonstrate, however, that *Townsend*'s approach, like that in *Fay* v. *Noia*, was based on a misconception of federal/state relations that undervalued the importance of state court rulings, and failed to strike the proper balance between co-equal sovereigns.

A. A District Court's Discretion to Hold an Evidentiary Hearing Must be Defined in a Manner Consistent with Principles Governing Habeas Corpus Generally.

When it enacted 28 U.S.C. § 2254(d), Congress implicitly recognized that a federal evidentiary hearing may occur even if there has been a full and fair state hearing on the disputed issue. That recognition does not

affect this Court's authority or obligation further to define and limit a district court's discretion to hold such hearings.

The Court exercised that authority in *McCleskey*, where it addressed the limits of a district court's discretion to entertain abusive petitions under 28 U.S.C. § 2244(b) and Rule 9(b) of the Rules Governing Habeas Corpus Proceedings.[4] The Court noted that, although section 2244(b) provided that district courts "need not entertain" abusive petitions, it did not state any limits to a district court's authority to overlook a deliberately withheld or otherwise abusive claim to entertain the petition in any event. "That is, it does not state the limits on the district court's discretion to entertain abusive petitions." *McCleskey* v. *Zant*, 111 S.Ct. at 1466.

Section 2254(d) similarly does not state the limits of a district court's discretion to hold an evidentiary hearing regardless whether a hearing has already been held in the state court. Section 2254(d) thus poses the same question posed by section 2244(b), *see McCleskey* v. *Zant*, 111 S.Ct. at 1466, and presents the states with the same dilemma: at what point does a federal habeas court's discretion to hold an evidentiary hearing abuse the states' sovereign power to punish offenders.

In *McCleskey*, this Court stated that "Congress did not intend § 2244(b) to foreclose application of the court-

4. 28 U.S.C. § 2244(b), enacted together with 28 U.S.C. § 2254(d), established a qualified application of the doctrine of res judicata. 1966 U.S. Code Cong. & Ad. News 3663-3664; *see McCleskey* v. *Zant*, 111 S.Ct. at 1466. Rule 9(b), adopted ten years later with Rule 8 of the Rules Governing Habeas Corpus Proceedings, confers authority to dismiss repetitive and abusive petitions. *McCleskey* v. *Zant*, 111 S.Ct. at 1466-1467.

announced principles defining and limiting a district court's discretion to entertain abusive petitions." 111 S.Ct. at 1466. The Court thereafter defined and limited the district court's discretion under section 2244(b) and Rule 9(b). 111 S.Ct. at 1466-1471. The same application of court-announced principles defining and limiting a district court's discretion to hold an evidentiary hearing is required here.

Section 2254(d) does not speak to the necessity of holding an evidentiary hearing; rather, it governs the burden of proof with respect to a federal court's review of state court factual determinations. Rule 8 provides that the federal court, if it has not previously dismissed the petition, shall "determine whether an evidentiary hearing is required." Thus, notwithstanding the existence of a statute granting a federal court jurisdiction to hold an evidentiary hearing, this Court, in the exercise of its supervisory authority, may limit the discretion of the lower federal courts to hold such hearings, as it limited the district court's discretion to entertain abusive petitions in *McCleskey*.

Under current law, *Townsend* v. *Sain* defines the circumstances requiring an evidentiary hearing. *McCleskey* and *Coleman*, however, now compel the view that *Townsend* failed to strike the proper balance between state and federal courts with respect to the adjudication of factual issues. *Townsend* went far beyond defining when an evidentiary hearing is mandatory. It gave federal courts unlimited discretion to hold such hearings.

In its attempt to limit that discretion, Congress provided that a "determination after a hearing on the merits of a factual issue, made by a State court of

competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct," unless the petitioner shows the existence of a statutory exception to that presumption. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. at 546-548.

Not only should the above-described state court determination be presumed correct, it should be conclusive on the issue whether an evidentiary hearing in federal court may be held at all. Where the state court, after a hearing, has determined the merits of a factual issue, no relitigation of that factual issue should occur in federal court, absent a showing that an impediment to the presentation of the factual claim was caused by some factor external to the defense.[5/]

What constitutes a "determination on the merits of a factual issue" has been broadly defined by this Court:

> "[T]he California Court of Appeal made the factual determinations at issue here and it did so after a review of the trial court record. Nevertheless, it clearly held a 'hearing' within the meaning of § 2254(d). Both respondent and the State were formally before the court. Respondent was given an opportunity to be

5. There may also be cases in which a hearing was not held because the petitioner failed to present the claim in the first instance or was otherwise procedurally barred. In that event, the doctrine of procedural default will bar any federal court consideration of the claim absent a showing of cause and prejudice, or a fundamental miscarriage of justice. *See Coleman* v. *Thompson*, 111 S.Ct. at 2565.

> heard and his claim received plenary consideration even though he failed to raise it before the trial court. After respondent presented his case to the state appellate court, that court concluded in a written opinion that 'the facts of the present case' did not adequately support respondent's claim. Since that court was requested to determine the issue by respondent, we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d). . . . ¶ . . . Section 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. [Citation.] This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts." *Sumner* v. *Mata*, 449 U.S. at 546-547.

Just as state reviewing courts adjudicate claims pursuant to applicable standards of review, and accept or reject factual determinations pursuant to those standards, so, too, should federal courts in collateral proceedings adjudicate the constitutional claims before them. In so doing, federal courts must accord all deference due state court factual determinations. Only upon a showing that the state actually impeded the presentation of a petitioner's claim may a petitioner be entitled to a federal evidentiary hearing.

B. Factors Constituting an External Impediment to Presentation of the Claim in State Court.

In *McCleskey*, this Court stated, with reference to procedural default cases, that "the cause standard requires the petitioner to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court." 111 S.Ct. at 1470, citing *Murray* v. *Carrier*, 477 U.S. at 488. Objective factors constituting cause include interference by state officials, constitutionally ineffective assistance of counsel, and a showing that the factual or legal basis for a claim was not reasonably available to counsel. *Id*; *see Coleman* v. *Thompson*, 111 S.Ct. at 2566-2567. The *McCleskey* Court concluded that the same cause standard should apply to cases involving abusive writ petitions. 111 S.Ct. at 1470.

The factors constituting cause enunciated in *McCleskey* and *Coleman* should also govern the availability of an evidentiary hearing in a federal habeas proceeding. Accordingly, in order to receive a federal evidentiary hearing, a petitioner must show that some objective factor external to the defense impeded his efforts to have his claim determined in the state courts.

A petitioner may satisfy his burden by showing that the state actually interfered with his ability to present the claim, such as by withholding material evidence relevant to a fair disposition of the claim. He may also show that the state court erroneously declined to determine the merits of his claim by relying on a state procedural rule which is not consistently or regularly applied. *Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988).

Additionally, a petitioner may satisfy his burden by showing that he was denied constitutionally effective counsel. To do so, however, the petitioner must first establish that he had a constitutional right to counsel. *Coleman* v. *Thompson*, 111 S.Ct. at 2566-2567. A defendant has a constitutional right to counsel in his first appeal as of right; he does not have a constitutional right to counsel in state post-conviction proceedings. *Id*. at 2566, 2568; *Pennsylvania* v. *Finley*, 481 U.S. 551, 555 (1987); *see McCleskey* v. *Zant*, 111 S.Ct. at 1471. Accordingly, a petitioner cannot claim that he was denied constitutionally effective assistance of counsel in state collateral proceedings. *Coleman* v. *Thompson*, 111 S.Ct. at 2566. Where a defendant has no right to assistance of counsel, he must "bear the risk of attorney error." *Id*. at 2566-2567. On the other hand, if he establishes his entitlement to counsel, the federal habeas petitioner must further demonstrate that he has separately raised and exhausted his claim of constitutionally ineffective counsel. *Murray* v. *Carrier*, 477 U.S. at 488-489.

A petitioner may in some cases be able to establish that his claim is "'so novel that its legal basis [was] not reasonably available to counsel.'" *Id*. at 489-490, citing *Reed* v. *Ross*, 468 U.S. 1, 16 (1984); *see Coleman* v. *Thompson*, 111 S.Ct. at 2566; *McCleskey* v. *Zant*, 111 S.Ct. at 1470. Whether a petitioner is entitled to a federal hearing, however, depends upon whether the claim can survive the *Teague* retroactivity bar. *See McCleskey* v. *Zant*, 111 S.Ct. at 1470-1471; *Teague* v. *Lane*, 489 U.S. at 311-313.

If a petitioner cannot establish an external impediment under the above criteria, and no state court

hearing was held on the disputed issue, the federal court may hold an evidentiary hearing only if review of the petitioner's claim is necessary to correct a fundamental miscarriage of justice. "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray* v. *Carrier*, 477 U.S. at 496. Similarly, if a petitioner demonstrates that a hearing is necessary to establish his factual innocence, a federal court retains discretion to hold a hearing even in the absence of establishing an external impediment to the presentation of his claim.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

DATED: November 21, 1991

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No. 91-1859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. C. KEENEY,

Petitioner,

vs.

JOSE TAMAYO-REYES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is "deliberate by-pass" or "cause and prejudice" the correct test for determining when a federal habeas petitioner will be excused for failing to develop a material fact in state proceedings?

IN THE

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J. C. KEENEY,

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vs.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION OF AMICUS CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.4, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief amicus curiae in support of petitioners in the above captioned case. Counsel for petitioner has consented in writing, but counsel for respondent has refused consent.

In the accompanying brief, amicus argues that this Court should continue the process of limiting relitigation *de novo* on habeas corpus of questions already fully and fairly considered in the state courts. Specifically, amicus argues that the "cause and prejudice" test should apply to prevent relitigation of a factual issue on the basis of a deficiency in the state court proceeding caused by the defense itself.

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, amicus requests leave to file its brief.

Dated: November, 1991

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1991

J. C. KEENEY,

Petitioner,

vs.

JOSE TAMAYO-REYES,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

SUMMARY OF FACTS AND CASE

Respondent José Tamayo-Reyes got into a knife fight with his fiancée at a bar. Pet. Cert. 3. When a stranger attempted to intervene, Tamayo killed him. *Ibid*. Tamayo was charged with murder and pleaded no contest to manslaughter. *Ibid*. He was represented by counsel and had the services of a translator during these proceedings. *Tamayo-Reyes* v. *Keeney*, 926 F. 2d 1492, 1493 (CA9 1991).

In state collateral proceedings, Tamayo claimed that he had not received an adequate translation during the plea proceedings. *Ibid*. He was represented by counsel during these collateral proceedings. *Id*., at 1499. After a hearing, the state court found that Tamayo had received a full and accurate translation. *Id*., at 1495.

On federal habeas corpus, the magistrate found that the state court findings were presumed correct under 28 U. S. C. § 2254(d) and that no hearing was required. Pet. Cert. App. 38. The district court agreed. *Id.*, at 32. The Ninth Circuit reversed in part and remanded for an evidentiary hearing. *Tamayo-Reyes*, *supra*, 926 F. 2d, at 1502.

Addressing the state court findings that Tamayo received an accurate translation of the plea form and the plea proceeding, the Court of Appeals held that these findings were entitled to the presumption of correctness. *Ibid.* However, the Court of Appeals found inadequacies in Tamayo's attorney's presentation of the evidence regarding translation of the mental elements of manslaughter. *Id.*, at 500.

The Court of Appeals found that the failure to fully develop the facts, despite representation by counsel and a "full-blown hearing," *id.*, at 1498, did not constitute "inexcusable neglect" under *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). "The standard for inexcusable neglect is deliberate bypass. . . . " *Tamayo-Reyes*, *supra*, 926 F. 2d, at 1501. Therefore, the court held, another evidentiary hearing was required. *Id.*, at 1502.

SUMMARY OF ARGUMENT

Townsend v. *Sain* has little value as precedent. It rests primarily on *Fay* v. *Noia*, which is a totally discredited decision. *Townsend* is inconsistent with both earlier, sounder precedent and with subsequent developments. The policies which underlie *stare decisis* call for this anomaly in the law to be removed.

Congress did not codify *Townsend*'s "inexcusable neglect" standard when it enacted 28 U. S. C. § 2254(d). Neither the statute nor the committee reports mention the specific point. The overall purpose of the 1966 enactment was to reduce the volume of habeas relitigation, in part by offering states incentives to provide their own remedies. That purpose would be defeated by a rule that so easily brushes aside the state court's findings.

The cause and prejudice standard adopted in other contexts provides the appropriate balance between finality and protection of criminal defendants.

ARGUMENT

I. *Townsend* v. *Sain* has little value as precedent.

A. Precedent.

In a case such as this one, where there is no reliance interest in a precedent, *stare decisis* rests on "the interest in stability and orderly development of the law." *Runyon* v. *McCrary*, 427 U. S. 160, 190 (1976) (Stevens, J., concurring). The stability factor, in turn, rests on the idea that the judge should " 'lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.' " *Id.*, at 191 (quoting B. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

Justice Cardozo's metaphor helps explain why respect for *stare decisis* is "not a mechanical formula of adherence to the latest decision . . . ." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). The bricklayer should not blindly lay the new course of bricks on top of the last one without checking to see that the last one itself was laid straight. If the last course was laid without regard for the courses beneath it, then it should normally be removed before proceeding further.

The reasons for following precedent in criminal procedure cases were summarized this way in *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986) (citations omitted):

> "[T]he important doctrine of *stare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitu-

> tional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' "

On occasion, however, the Court must confront a situation where the law *has* changed erratically, has *not* developed in a principled and intelligible fashion, and has taken a detour for reasons either unarticulated, unconvincing, or no longer true. In such a case, respect for *stare decisis* calls for overruling, not upholding, the errant case.

Fay v. *Noia*, 372 U. S. 391, 438 (1963) adopted the "deliberate by-pass" standard for procedural defaults. *Townsend* v. *Sain*, 372 U. S. 293 (1963) simply incorporated this standard from *Noia*. *Id*., at 317.

As we will demonstrate in the next two sections, *Noia* and *Townsend* disregarded precedent, are inconsistent with subsequent cases, and were based on assumptions which are no longer valid. This course of bricks is out of line with all the others, both earlier and later. Stability of the law calls for its removal.

B. Pre-Townsend Cases.

In the early habeas corpus cases, there were two lines of authority dealing with prior adjudications. One dealt with successive habeas corpus petitions, and the other dealt with relitigation of issues already passed on by state courts. The two lines were joined together in *Ex parte Hawk*, 321 U. S. 114, 118 (1944) and *Brown* v. *Allen*, 344 U. S. 443, 463 (1953), overruled in *Townsend*, *supra*, 372 U. S., at 312.

The first substantial post-Reconstruction discussion on repetitive applications is in *Ex parte Cuddy*, 40 F. 62 (C.C.S.D.Cal. 1889). Cuddy was held in contempt for attempting to improperly influence a juror. According to his second petition, the transaction took place a quarter mile from the courthouse. *Id*., at 63. Cuddy contended that his actions were not in the presence of the court, and therefore the court had no contempt jurisdiction. The relevant statute provided "that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their [the courts'] presence, or so near thereto as to obstruct the administration of justice . . . ." *Ibid*. (quoting from Rev. Stat. § 725).

The Supreme Court had decided Cuddy's first petition on the same day it decided a similar case, *Ex parte Savin*, 131 U. S. 267 (1889).[1] Savin had attempted to bribe a witness in the jury room and again in the hallway. *Id*., at 269. The *Savin* Court decided that "presence" was not limited to the personal presence of the judge but instead extended throughout the courthouse. *Id*., at 277.

Cuddy's first petition was limited to conclusory allegations of lack of jurisdiction supported only by the records of the contempt proceeding. *Ex parte Cuddy*, 131 U. S. 280, 281-283 (1889). From the contempt order it may be fairly inferred that Cuddy's actions did not occur in the personal presence of the judge, see *id*., at 281-282, but neither the petition nor the record indicate whether Cuddy approached the juror in the courthouse or elsewhere. *Id*., at 284. The Supreme Court affirmed denial of relief. *Id*., at 287.

The second application was made to Justice Field as circuit justice. After discussing other possible grounds for decision, Justice Field based his denial squarely on the ground of the prior petition.

> "If [petitioner] can renew [his application] on another record, which may also be in some other particular

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1. Both cases were argued April 25, 1889, and decided May 13, 1889. See 131 U. S. 267, 280.

defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression, instead of a means of relieving one from an unjust and illegal imprisonment. The writ of *habeas corpus*, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs.

* * *

"In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And, in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration of the fact that a previous application had been made to another officer and refused; and *in some instances that fact may justify a refusal of the second.*

* * *

"In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, *or which might have been presented*, on the first. The question is entirely different when *subsequent occurring events* have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are *no new facts which did not exist* when the first was presented. And under the law of the United States an appeal is allowed to the supreme court where the writ is refused,—*a provision which would seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance*. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a

new application by, the petitioner." *Cuddy*, *supra*, 40 F., at 65-66 (emphasis added).

Cuddy thus holds that as a general rule the first petition must present all facts in support of the petition which can be presented. There must be some good reason why the facts were not presented the first time to avoid a dismissal of the second petition. Significantly, there is no hint of a requirement that the petitioner's conduct has been inequitable in the sense that he is coming to the court with unclean hands. Cf. *Fay* v. *Noia*, 372 U. S. 391, 438 (1963); *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). The lack of a good reason for not presenting the evidence on the first petition is sufficient to deny the writ.

Nonexistence of the supporting facts at the time of the first petition is obviously a good enough reason. The failure of the counsel to present those facts was not good enough in *Cuddy*, however. Cuddy appears to have been represented by counsel throughout the proceedings, see 131 U. S., at 281, and that fact may have had a bearing on the decision. Cf. *Price* v. *Johnston*, 334 U. S. 266, 291 (1948) (*pro se* petitioner).

In *Salinger* v. *Loisel*, 265 U. S. 224 (1924), the Supreme Court held that a prior habeas petition was not *res judicata* but that the common law rule of "independent judgment on each successive application" was no longer in effect. *Id.*, at 230-231. The mandate of Congress "to dispose of the party as law and justice may require" meant that the availability of appellate review and denial of prior habeas relief could "be considered, and even given controlling weight." *Id.*, at 231. *Salinger* quoted *Cuddy*, *supra*, with approval. *Id.*, at 231-232. Thus, the denial of a prior petition occupies some vaguely defined middle ground. It is less than *res judicata*, but a prior denial carries much more than the zero weight which it carried at common law.

Wong Doo v. *United States*, 265 U. S. 239 (1924) was decided the same day as *Salinger*. Wong Doo's first petition presented two grounds, but he put on no proof of the second. He then relied on the second ground for his second petition. *Id.*,

at 239-240. The Supreme Court held that the lower court erred in invoking the rigid bar of *res judicata* but that the case was so clearly an abuse of the writ that no remand was necessary. *Id.*, at 241. The Court believed that the evidence "was accessible all the time," *ibid.*, and Wong Doo was apparently represented by counsel.[2]

A second line of cases dealt with factual determinations by state courts. In *Frank* v. *Mangum*, 237 U. S. 309 (1915), petitioner's allegations of mob domination of the trial had been investigated by the state courts and found to be untrue. *Id.*, at 333. The Court held that this determination was not *res judicata*, *id.*, at 333-334, "but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction." *Id.*, at 335-336.[3]

Moore v. *Dempsey*, 261 U. S. 86 (1923) is often cited incorrectly as repudiating *Frank*. See, *e.g.*, *Fay* v. *Noia*, 372 U. S. 391, 421 (1963). While the *Noia* majority thought the cases to be "almost identical," *ibid.*, the *Moore* majority did not.

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2. *Price* v. *Johnston*, 334 U. S. 266, 289-290 (1948) distinguished the earlier cases on the basis that Price's new petition raised a new issue. The fact that Price was *pro se* throughout the proceeding, see *id.*, at 291-292, was probably a factor as well.

3. There has been much hand-wringing over the *Frank* case by people convinced that Frank was innocent. See, *e.g.*, *Habeas Corpus Reform: Hearings on S. 88, S. 1757, and S. 1760 Before the Senate Judiciary Comm.*, 101st Cong., 1st & 2d Sess. 125 (1989-90) ("Hearings") (statement of Chief Judge Donald Lay). These critics generally ignore or gloss over the fact that Frank was not executed by the state, but was granted executive clemency. Compare *ibid.*, with L. Dinnerstein, *The Leo Frank Case* 139 (1968). Tragically, he was then lynched by vigilantes. Dinnerstein, at 141. In light of the general attitude toward the federal government in 1915 Georgia, it is highly likely that a federal writ would have produced the same result.

The *Moore* case was a virtual catalog of the federal constitutional violations recognized at the time. Testimony was extracted by torture. 261 U. S., at 89. Counsel was appointed immediately before the trial, had no opportunity to prepare, and presented no defense. *Ibid.* Blacks were systematically excluded from both the grand and petit juries. *Ibid.* Comparing Justice Holmes' description of the mob influence in *Moore*, *id.*, at 89-90, with his description in *Frank*, 237 U. S., at 345-346 (dissent), it is evident that a far greater degree of crowd influence had been alleged in *Moore*. Justice Holmes' opinion accepts *Frank* as binding precedent and distinguishes it on the facts:

> "We assume, in accordance with that case [*Frank*], that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. *It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way.* But if the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." 261 U. S., at 91 (emphasis added).

Thus, it is the magnitude of the alleged violation, according to *Moore*, that justifies reconsideration of questions already passed upon. "[C]laims of constitutional error are not fungible." *Rose* v. *Lundy*, 455 U. S. 509, 543 (1982) (Stevens, J., dissenting).

In *Ex parte Hawk*, 321 U. S. 114 (1944), the Court attempted to clear up the confusion surrounding habeas corpus. Much of the *Hawk* opinion is *obiter dicta*; the holding of the case is purely on the question of exhaustion. See *id.*, at 118. Even so, the discussion is enlightening.

> "Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. *Salinger* v. *Loisel*, 265 U.S. 224, 230-232. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan*, *supra*, [294 U.S.] 115, or because in the particular case the remedy afforded by state law proves *in practice unavailable or seriously inadequate*, cf. *Moore* v. *Dempsey*, 261 U.S. 86, *Ex parte Davis*, 318 U.S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless." *Ibid.* (emphasis added).[4]

The phrase "in practice unavailable or seriously inadequate" implies something more serious than disagreement with the state court's reasonable conclusion. *Hawk* seems to reconcile *Frank* and *Moore* on their facts on the basis later suggested by Professor Bator: that the state court in *Frank* had made a careful, reasoned determination, but the state court in *Moore* had not. See Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 488-489 (1963).

Hawk's citation of *Salinger* is particularly significant, because it ties the successive federal petition line of cases together with prior state adjudication decisions. The prior state proceeding, in other words, is entitled to the same degree of respect as a prior federal court proceeding. Federal habeas corpus review, whether on the first or second petition, should be made available when other remedies are unavailable or inadequate. It should not be used to relitigate points already

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4. *Mooney* and *Davis* are both exhaustion cases where the state court remedy had not been shown to be inadequate or unavailable at the time of application for the writ.

fairly decided by a competent court.

The question of prior state adjudication was squarely presented in *House* v. *Mayo*, 324 U. S. 42 (1945), where the district court had denied a petition on the ground that the claim had been fully and competently litigated in the state courts. *Id.*, at 47. *House* expressly acknowledges that the district court's deference would have been correct had the state court ruled on the merits, citing *Hawk*, but reversed solely because the state court decision had been on the ground that the remedy sought was not available under state law. *Id.*, at 48. *House* elevates *Hawk*'s dictum to a holding.

When Henry Hawk returned to the Supreme Court on certiorari from denial of state collateral relief, the Court explained the allocation of responsibilities between the state courts, the federal habeas courts, and the Supreme Court:

> "When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White* v. *Ragen*, 324 U.S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings." *Hawk* v. *Olson*, 326 U. S. 271, 276 (1945).

With this foundation, we come to the landmark case of *Brown* v. *Allen*, 344 U. S. 443 (1953). Justice Reed's opinion is the opinion of the Court on all points except the effect of the prior denial of certiorari. *Id.*, at 451-452. Although Justice Frankfurter sought to designate part II of the first of his two opinions as a second majority opinion, *id.*, at 497, it is not designated as such by the Court. Indeed, it is not fully joined by *any* other Justice, although others express a very general agreement. See *id.*, at 488 (Burton and Clark, JJ.) ("recognize the propriety of the considerations . . . "); *id.*, at 513 (Black and Douglas, JJ.) ("agree in substance").

The opinion of the Court holds that the state proceedings may not be disregarded. *Id.*, at 458. "[W]here there is material conflict of fact . . . , the District Court may properly depend upon the state's resolution of the issue." *Ibid.* Part III of the *Brown* opinion deals squarely with the issue in the present case: the right to a plenary hearing. A hearing is required only after the district court has decided to "entertain" the petition. *Id.*, at 461. In this context, "entertain" "means a federal district court's conclusion, after examination of the application . . . that a hearing on the merits legal or factual is proper." *Ibid.*

Explaining when a hearing would be proper, the Court explained that nothing in the 1948 revision of title 28 was intended to change the rule of *Salinger* v. *Loisel* that an application might be denied solely on the ground that the issues had been litigated before. *Id.*, at 463.

> "Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle [as *Salinger*]—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given *fair consideration* to the issues and the offered evidence, and has resulted in a satisfactory conclusion." *Id.*, at 463 (emphasis added).
>
> "As the *state and federal courts have the same responsibilities* to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, *without a rehearing of the facts*, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction. . . ." *Id.*, at 465 (emphasis added).

Where the records and the petition do not present an "extraordinary situation," the district court may properly grant a motion to dismiss. *Ibid.*

The *Brown* majority then proceeded without explanation to reexamine the legal questions on the basis of the state factual record. *Ibid.* Because of this fact and Justice Frankfurter's statements in his concurring opinion, *id.*, at 507-508, *Brown* was thereafter thought to establish a rule that the habeas petitioner was entitled to a *de novo* review on questions of law. See, *e.g.*, H.R. Rep. No. 1892, 89th Cong., 2d Sess. 5 (1966). This was a departure from the role of the habeas corpus court. From *Ex parte Royall*, 117 U. S. 241, 253 (1886) to *Hawk* v. *Olson*, 326 U. S. 271, 276 (1945), correction of error in the state court's resolution of the issue had been considered primarily the Supreme Court's responsibility on direct review of the state judgment. The reason for this shift is generally understood to be the growth of the country. The Court "could no longer perform its historic function of correcting constitutional error . . . and had to summon the inferior federal judges to its aid." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 154 (1970).

There did not at this time appear to be the same need as to factual determinations, however. The rule of *Salinger* and *Cuddy*, as made applicable to state prisoners in *Hawk* and *House*, was therefore retained by *Brown* as to factual determinations: "to prevent a second application upon the same facts which were *or might have been* presented in the first instance." *Ex parte Cuddy*, *supra*, 40 F., at 66 (emphasis added).

C. Fay v. Noia.

What changed between 1953 and 1963? The answer is suggested in Justice Frankfurter's concurrence in *Irvin* v. *Dowd*, 366 U. S. 717, 729-730 (1961). Inflammatory pretrial publicity was a common problem, according to Justice Frankfurter, exceeding the Court's capacity to correct. "For one reason or another this Court does not undertake to review all such envenomed state prosecutions." *Id.*, at 730. This statement indicates a belief that dereliction of duty was widespread among state courts. If so, deference to factual findings under *Brown* might lead to a large number of actual miscarriages of

justice.[5]

Although *Townsend* appears first in the official reports, *Fay* v. *Noia*, 372 U. S. 391 (1963) is actually the lead case of the pair. After a long and specious historical discussion, *id*., at 399-426, *Noia* announced its "deliberate by-pass" test for procedural defaults. *Id*., at 438. In doing so, it barely mentioned the flatly contrary rule of a landmark precedent squarely on point. See *Daniels* v. *Allen*, decided with *Brown* v. *Allen*, 344 U. S. 443, 487 (1953).

Noia today is a totally discredited decision. Its historical misrepresentations were quickly and thoroughly documented. See *Noia*, at 449-463 (Harlan, J., dissenting); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 Mich. L. Rev. 451 (1966); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965). Its "sweeping language" was rejected as *dicta* in *Wainwright* v. *Sykes*, 433 U. S. 72, 87-88 (1977). *Noia* was overruled, albeit without the explicit use of that word, when the Court applied a different test and reached the opposite result on indistinguishable facts in *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 669, 111 S. Ct. 2546, 2565 (1991).

Particularly significant is *Coleman*'s recognition that *Fay* v. *Noia* undervalued the importance of finality. *Ibid*. This importance is not limited to state procedural rules, as *Coleman* recognizes, *ibid*., by its citation of *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991). In rejecting the deliberate by-pass standard for successive petitions, *McCleskey* recognized the importance of finality in a context where no state rule was involved. See *id*., 113 L. Ed. 2d, at 544, 111 S. Ct., at 1470.

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5. The *Irvin* majority dealt with the immediate problem at hand by rendering a dubious holding that pretrial publicity was a "mixed question" calling for *de novo* review of the jury *voir dire*, rather than a factual question calling for deference. Cf. *Patton* v. *Yount*, 467 U. S. 1025, 1036 (1984).

Townsend v. *Sain*, 372 U. S. 293, 317 (1963) states "The standard of inexcusable default set down in *Fay* v. *Noia* adequately protects the legitimate state interest in orderly criminal procedure . . . . " That statement has been repudiated by *Sykes*, *McCleskey*, and *Coleman*. To the extent *Townsend* relies on *Noia*'s evaluation of the competing interests, its foundation has been washed away.

D. Townsend v. Sain.

Townsend had confessed after being given a drug which the state said was treatment for his narcotics withdrawal but which Townsend said was a "truth serum." *Townsend*, *supra*, 372 U. S., at 299. At the state hearing, Townsend was represented by counsel and had an expert witness who testified at length about the properties of the drugs used. *Id*., at 302; *id*., at 332-333 (Stewart, J., dissenting).

A bare majority of the Court joined an opinion which is notable for both the breadth of its pronouncements and the dearth of authority to support them. See *id*., at 312-317; cf. *id*., at 327 (Stewart, J., dissenting). The contrary precedent of *Brown* v. *Allen* and the cases that led up to it were brushed aside. *Id*., at 312. Replacing the double-sided discretion of *Brown* and its antecedents was a list of conditions where a new hearing was mandatory, with continued open-ended discretion in all other cases. *Id*., at 318.

The majority held that a new hearing was required in Townsend's case for two reasons. First, it was said that there was no way to reconstruct the state judge's findings of fact from the record. *Id*., at 321. Second, and critically important to the present case, was the majority's criticism of the defense's presentation of the evidence:

> "To be sure, there was medical testimony as to the general properties of hyoscine, from which might have been inferred the conclusion that Townsend's power of resistance had been debilitated. But the crucially informative characterization of the drug, the characterization which would have enabled the judge and jury,

> mere laymen, intelligently to grasp the nature of the substance under inquiry, was inexplicably omitted from the medical experts' testimony. Under the circumstances, disclosure of the identity of hyoscine as a 'truth serum' was indispensable to a fair, rounded, development of the material facts. And the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default. See *Fay* v. *Noia*, 372 U. S. 438 (Part V)." *Id.*, at 321-322.

In other words, the fact that the defendant's medical expert did not speak plain English was a good enough reason to treat the state proceedings as a nullity. Four dissenting Justices agreed that this holding served "to debase the Great Writ of Habeas Corpus." *Id.*, at 334 (Stewart, J., dissenting).

The departure from precedent in *Townsend* and *Noia* can be justified, if at all, only on the basis stated in *Vasquez* v. *Hillery*, 474 U. S. 254, 266 (1986): "to bring [the Court's] opinions into agreement with experience and with facts newly ascertained." *Townsend* and *Noia* reflect a truly dismal assessment of the state courts in the area of criminal procedure. Justice Frankfurter's gloom in *Irvin*, see *ante*, p. 13, contrasts sharply with his vigorous defense of the state courts in civil matters. See *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U. S. 511, 518-519 (1955).

Perhaps this assessment was justified in 1963. It is not today. Since the criminal procedure revolution began, an entire generation of lawyers steeped in the Bill of Rights has graduated from law school, practiced in the courts, and been appointed to the state bench. The legal landscape today bears little resemblance to that of 1963. Would any state judge today, in response to a federal constitutional objection, assert that the case was being tried under the state and not the federal constitution? Cf. *Estes* v. *Texas*, 381 U. S. 532, 556 (1965) (Warren, C. J., concurring). Any judge who did would be the laughingstock of the state.

In *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 210, 110 S. Ct. 2822, 2830 (1990), this Court explicitly refused to adopt the low

opinion of state courts promoted by the supporters of unlimited habeas review. *Sawyer* rejected the unfounded, insulting allegation that state courts respect constitutional rights only because of the threat of federal habeas corpus. *Ibid.*; cf. *Hearings*, *supra* note 3, at 125. That same confidence in state courts justifies reconsideration of *Townsend*.

The *Townsend* decision was the result of a disregard of precedent, reliance on a since-discredited case, and a deep distrust of state courts unjustified in our time. Standing alone, its value as precedent is virtually nil. The only substantial argument for its retention is that Congress has codified it. Amicus will address that argument next.

II. Congress did not codify *Townsend*.

The assertion that Congress codified the status quo in 1966 would come as a great surprise to those who drafted and voted for the habeas corpus bill of that year. The committee reports of both houses exude a deep dissatisfaction with the flood of habeas petitions and a clear intent to change the law to reduce them. See H.R. Rep. No. 1892, 89th Cong., 2d Sess. 4-7 (1966) ("House Report"); S. Rep. No. 1797, 89th Cong., 2d Sess. 2 (1966) ("Senate Report").

Subsection (d) of 28 U. S. C. § 2254 does, to be sure, adopt some of *Townsend*'s criteria for what is not a full and fair hearing in state court. One of those criteria is inadequate development of the facts. 28 U. S. C. § 2254(d)(3).[6]

The section says nothing, however, about when that inadequate development may be attributed to the petitioner so that he may not complain of it. *Townsend* expressly noted that

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6. As the Court of Appeals notes, *Townsend* deals with when a hearing is required, while the statute deals with a presumption. *Tamayo-Reyes*, *supra*, 926 F. 2d, at 1497. However, a presumption that petitioner cannot overcome and that is dispositive of the case renders an evidentiary hearing pointless.

such a circumstance existed. *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963). The question is whether any intent can be inferred from Congress's silence on the point.

There are several possibilities. First, by adopting an "inadequate development" exception with no express qualification, Congress may have intended to broaden the *Townsend* rule to apply to all inadequate development cases, even if deliberately caused by the defendant personally. Such a literal reading would be in direct conflict with the evident purpose of the legislation.

Second, it is possible that by lifting this language from *Townsend*, Congress intended to bring *Townsend*'s extremely liberal construction of "inexcusable neglect" along with it. As a mechanical matter of statutory construction, this argument has some appeal. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). For reasons we will describe below, however, it would conflict with the purpose and intended effect of the statute.

A third possibility is that Congress was unable to agree on this point. If so, it said nothing because, as a whole, it intended nothing. We saw this phenomenon quite explicitly in the 1990 crime bill. The House and Senate passed such strongly conflicting measures on habeas reform and capital punishment that the entire reform was "stripped from the crime bill by the conference committee." See *Statement by President George Bush Upon Signing S. 3266*, 8 U. S. Code Cong. & Admin. News, 101st Cong., 2d Sess. 6696-1 (1990). A less public and less obvious decision to do nothing due to deadlock might occur earlier in the process. A fourth, and closely related, possibility is that Congress did not think about the question at all.

"It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). No such circumstances are present with regard to *Townsend*'s "inexcusable neglect" standard. The key to interpretation, amicus submits, is whether a construction of 28

U. S. C. § 2254(d)(3) to codify *Townsend*'s variant of "inexcusable neglect" would further the purpose of the statute. The goal of interpretation "is the proliferation of purpose." Frankfurter, *supra*, 47 Colum. L. Rev., at 529.

The purpose of the 1966 legislation was to introduce greater finality of judgments to habeas proceedings, Senate Report, *supra*, at 2, and "to provide a qualified application of the doctrine of res judicata," House Report, *supra*, at 3. Subdivision (d) of section 2254 was intended to offer "a strong inducement to states that have not already done so" to develop adequate post-conviction remedies. Senate Report, *supra*, at 3.

These goals are defeated if a state proceeding can easily be brushed aside on the basis of factors entirely beyond the state's control. States will not be induced to conduct their own collateral reviews if those reviews are nothing more then a dress rehearsal for the "real" hearing in federal court. If a mandatory new hearing with no presumption of correctness is triggered by a Monday-morning quarterback critique of counsel's examination, the inducement which Congress intended will be lost. In times when government resources are stretched to the limit, few expenditures appear more wasteful than holding trials which do not settle the questions.

Construing 28 U. S. C. § 2254(d)(3) to carry with it *Townsend*'s approach to "inexcusable neglect" would be contrary to the purpose of the statute. That construction therefore should not be adopted.

III. The "cause and prejudice" standard should be adopted.

McCleskey v. *Zant*, 113 L. Ed. 2d 517, 546, 111 S. Ct. 1454, 1471 (1991) modified the "inexcusable neglect" standard previously applicable to successive petitions to conform to the "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977) and *Murray* v. *Carrier*, 477 U. S. 478 (1986). Similar considerations of finality in this case call for the same result.

Carrier and *Coleman* v. *Thompson*, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) hold that, as a general rule, when counsel's failure to raise a claim at an earlier proceeding prevents the state courts from considering the claim, that failure is attributable to the defendant. See *Carrier*, 477 U. S., at 492; *Coleman*, 115 L. Ed. 2d, at 672, 111 S. Ct., at 2567. The responsibility for the lack of resolution of the claim must fall somewhere. Either the defendant loses the ability to litigate the claim, or the state loses the finality of a proceeding in which it has invested much time and resources. In a capital case, the state loses irretrievably the deterrent value of the execution of the judgment within a reasonable time.

The cause and prejudice standard marks a careful, if somewhat wavering, line in this allocation. An impediment external to the defense is "cause," and the burden of it falls on the state. *Carrier*, *supra*, 477 U. S., at 492. This is so even when the cause is beyond the control of either party and no fault of the state. See *Reed* v. *Ross*, 468 U. S. 1, 16 (1984) (novelty of claim).[7] Even ineffective assistance of counsel, although internal to the defense and generally beyond the state's control, is deemed attributable to the state in a proceeding where the defendant has a constitutional right to counsel. *McCleskey*, *supra*, 113 L. Ed. 2d, at 544, 111 S. Ct., at 1470.

The cause and prejudice standard makes a further exception where the error complained of has actually resulted in the conviction of an innocent person. *Id.*, 113 L. Ed. 2d, at 550, 111 S. Ct., at 1475. This exception ought to remove the objection that the defendant's punishment is the result of the attorney's error. McCleskey was not executed because of his attorney's omission of a claim. He was executed because he gunned down Officer Frank Schlatt while Officer Schlatt was bravely doing his duty to protect the people from crime. See *McClesky* v. *State*, 263 S. E. 2d 146, 147-148 (Ga. 1980); *McCleskey* v. *Zant*, *supra*, 113 L. Ed. 2d, at 550, 111 S. Ct., at 1475 (no doubt

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7. After *Teague* v. *Lane*, 489 U. S. 288 (1989), *Reed* v. *Ross* would apply only to cases within one of *Teague*'s exceptions.

of guilt). The procedural bar blocked a procedural claim; the sentence itself was right and just.

There is some force in the argument that certain claims are so fundamental that federal courts should reach them regardless of procedural rules and regardless of the defendant's guilt. See *Rose* v. *Lundy*, 455 U. S. 509, 543-544 (1982) (Stevens J., dissenting); *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923). One would be hard-pressed to argue that the parade of horribles in *Moore* should go uncorrected on any grounds. Such a further exception can be considered in the extremely unlikely event that such a violation escapes both state remedies and correction by this Court.

The issue before the Court on certiorari in the present case does not involve any allegation of such a fundamental violation. Tamayo had a lawyer and a translator at his plea proceeding. Pet. Cert. 3. The rule of *Henderson* v. *Morgan*, 426 U. S. 637, 646 (1976), that a defendant must be informed of the *mens rea* element of homicide before pleading, does not come close to the fundamental character of the rules violated in *Moore*.

According to state court findings which the court below held *were* entitled to the presumption of correctness, Tamayo received a proper translation of the plea form and plea proceeding. *Tamayo-Reyes* v. *Keeney*, 926 F. 2d 1492, 1502 (CA9 1991). In that duly translated form, Tamayo expressly represented to the state that his lawyer had advised him on the charge. He further expressly represented in open court that he understood the form. Pet. Cert. 4. The state did a thorough job of protecting Tamayo's rights. There is no fundamental unfairness here.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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